

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NO: 2:10-CV-1840 IPJ

ALABAMA GAS CORPORATION,
PLAINTIFF,

V.

TRAVELERS CASUALTY and SURETY COMPANY, et al.,
DEFENDANTS.

DEPOSITION

OF

Hon. Bernard Harwood

October 26, 2011

REPORTED BY: April Sargent
Certified Court Reporter
and Notary Public

1 S T I P U L A T I O N

2 IT IS STIPULATED AND AGREED,

3 by and between the parties, through their
4 respective counsel, that the deposition of Hon.
5 Bernard Harwood may be taken before April
6 Sargent, Commissioner, Certified Court Reporter
7 and Notary Public;

8 That the signature to and reading
9 of the deposition by the witness is NOT WAIVED,
10 the deposition to have the same force and effect
11 as if full compliance had been had with all laws
12 and rules of Court relating to the taking of
13 depositions;

14 That it shall not be necessary for
15 any objections to be made by counsel to any
16 questions, except as to form or leading
17 questions, and that counsel for the parties may
18 make objections and assign grounds at the time
19 of trial, or at the time said deposition is
20 offered in evidence, or prior thereto.

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1 A P P E A R A N C E S

2

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INDEX OF EXAMINATION

Page :

EXAMINATION BY MR. LASETER

5

INDEX OF EXHIBITS

Page :

Exhibit 1

35

Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood October 26, 2011

Page 5

1 I, April Sargent, a Certified Court
2 Reporter and Notary Public for the State of
3 Alabama at Large, acting as Commissioner,
4 certify that on this date, pursuant to Rule 30
5 of the Alabama Rules of Civil Procedure and the
6 foregoing stipulation of counsel, there came
7 before me at the offices of Hand Arendall, 1200
8 Park Place Tower, Birmingham, Alabama, on
9 October 26, 2011, commencing at 9:01 a.m., The
10 Hon. Bernard Harwood, witness in the above
11 cause, for oral examination, whereupon the
12 following proceedings were had:

13
14 HON. BERNARD HARWOOD,
15 being first duly sworn, was examined and
16 testified as follows:

17
18 EXAMINATION BY MR. LASETER:

19 Q. Good morning, Judge Harwood. Could
20 I have you state your full name for the record?

21 A. Robert Bernard Harwood, Jr.

22 Q. My name again is Scott Laseter. I
23 represent Alabama Gas Corporation, plaintiff in
24 the case that we're here for today. Are you at
25 least generally familiar with this lawsuit?

Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood October 26, 2011

Page 6

1 A. I am.

2 Q. Do you mind if I call you Judge
3 Harwood?

4 A. As long as everybody understands
5 that I recognize I'm no longer a judge. But
6 it's sort of a courtesy title that some people
7 use. So that'd be fine.

8 Q. And I noticed that in one of the
9 prior transcripts I'd read that the transcript
10 referred to you still as The Honorable Bernard
11 Harwood. Is that appropriate?

12 A. Well, and as I say, that's an
13 honorific, a courtesy title. I mean never
14 introduce myself as that. I introduce myself as
15 Mr. Harwood. But because of my fairly long
16 career, the Alabama lawyers always tend to just
17 use that term which is I think is sort of
18 traditional for retired judges.

19 Q. I want to ask you a few questions
20 about your education. It's not my practice to
21 ask a lot of questions that I already know the
22 answer to. So I'm going to assume that you went
23 to college and went to law school and graduated
24 and became a lawyer.

25 A. Correct.

1 Q. I wanted to ask whether during the
2 course of your formal education you ever took
3 any courses that were relevant to the insurance
4 issues?

5 A. You mean including law school?

6 Q. Yes.

7 A. Certainly a lot of the courses I
8 took, and most of that was the case book method,
9 included or employed cases that dealt with
10 insurance matters. I don't recall taking a
11 course called insurance construction or
12 something like that.

13 Q. To be sure I understand, the case
14 method examples that you were giving would be
15 the same cases that anybody that went to law
16 school would be studying; is that correct?

17 A. Right. So that in contracts,
18 torts, many of those courses, the cases would
19 involve insurance construction or insurance
20 matters.

21 Q. So nothing about your education was
22 specially in tort insurance?

23 A. No.

24 Q. Have you ever worked for an
25 insurance company?

Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood **October 26, 2011**

Page 8

1 A. Well, as a lawyer I been engaged by
2 an insurance companies. And during the first 28
3 years of my practice, it had evolved to where I
4 pretty much was exclusively a defense attorney
5 representing insurance companies. As you know,
6 we try to maintain the distinction of saying
7 that I represent the client until a tri-partite
8 relationship you secondarily represent the
9 insurance company. But I'm not employed by the
10 insurance company.

11 Q. And I asked a really bad question,
12 but you gave an excellent answer to it. I meant
13 to ask that, aside from your work as a lawyer,
14 had you ever worked for an insurance company as
15 an employee.

16 A. No.

17 Q. Am I correct that you went straight
18 from law school into the practice of law?

19 A. I did.

20 Q. You described your practice as
21 being what might be described as an insurance
22 defense practice?

23 A. Correct.

24 Q. I saw from the report that you had
25 written in the Hartford, the Mitchell & Company

1 case that you'd also said in that, that you'd
2 done coverage opinions?

3 A. Right.

4 Q. And advised insurance companies on
5 their duties under policies?

6 A. Correct.

7 Q. Is that distinct from what you
8 think of as an insurance defense practice?

9 A. I'll give you a lawyer-like answer,
10 yes and no. For example, I did all the work in
11 that geographical area for USF&G. Shows you how
12 long ago it was because they no longer exist.
13 But they would from time to time ask me to give
14 coverage opinions in cases in which case for
15 which I was not otherwise involved. Naturally
16 if I was the retained counsel for a defense,
17 they would have other counsel do coverage
18 opinions. So from time to time a lot of the
19 different insurance companies that I represented
20 might ask me for a coverage opinion.

21 Q. You mentioned USF&G as one of your
22 clients. Can you recall other of your insurance
23 company clients?

24 A. I would say this, about any
25 insurance company that existed back then, I had

1 from time to time did work. Because I did a lot
2 of conflict work, in other words, the regular
3 lawyer for say St. Paul or Utica Mutual or INA,
4 big and little Aetna. If they had a conflict,
5 they would quite often refer to me, because in
6 Tuscaloosa, if it was that area, I probably was
7 as an active insurance company lawyer as
8 anybody. So that's where you inherited a lot of
9 that.

10 Q. I think you said big and little
11 Aetna. What does that mean?

12 A. Well, they had Aetna that they
13 spelled with a small "a" and an Aetna they
14 spelled with a capital "a" back in those days,
15 so they would generally refer to it as big and
16 little Aetna. I did all the work for Horris,
17 Mann. I did all the work for Mutual Assurance.
18 And if given time I could probably come up with
19 some 20 or 30 insurance companies, some of which
20 I was their exclusive area lawyer, but many of
21 which I was, you know, always the bridesmaid,
22 never the bride. But that was fine with me
23 because enough overflow work came my way.

24 Q. Was Travelers on that list?

25 A. Yes, they would have been. But

1 it's hard for me to remember when they might ave
2 emerged. You know, certain companies were
3 taking over other companies. Certain companies
4 were coming into being. And as I indicated
5 certain companies were just disappearing.

6 Q. In your report you identified
7 approximately 1981 as the date of the emergence
8 of the tort of bad faith breach of insurance
9 contract. Did I get that right?

10 A. Right.

11 Q. And you were still practicing at
12 that time?

13 A. Oh, yeah.

14 Q. Did you ever handle bad faith
15 claims as a practicing attorney?

16 A. I did.

17 Q. On of behalf of insurers.

18 A. It would probably be 90 percent on
19 behalf of insurers. I was sort of a, and still
20 am an equal opportunity employer so to speak.
21 If I don't have a conflict, I work both sides of
22 the street. If it's a legitimate case and
23 people want to hire me, I don't worry about
24 whether I'm representing the insurance company
25 or the insured.

1 Q. Can you give me an approximation of
2 how many bad faith claims you would've handled
3 as a lawyer?

4 A. Well, before 1981, I think that was
5 the Chaviers case, and then in 1982 we had I
6 think one called Bowen. And then there was
7 Safeco versus Lee in 1983. I mean, the tort was
8 in its emergent state. We were all still
9 wrestling with it. There had been a case prior
10 to then where I think Justice Jones, Red Jones,
11 had written a special occurrence St. Vincent's
12 case in which he sort of projected the contour.

13 So everybody knew this was
14 something that was on the horizon. We had a lot
15 of suits of people claiming bad faith that were
16 coming out initially. But to give you a number,
17 I'd be hard pressed. You know, it started off
18 slow and began to build.

19 Q. Sure. And I may have asked a bad
20 question. I wasn't meaning to ask you to recite
21 those reported decisions in a bad faith area,
22 but rather was asking which cases you had
23 yourself handled. Did you understand my
24 question that way?

25 A. No. And as far as giving you a

1 name, I don't recall the name of any case up
2 until I went on the bench in '91.

3 Q. So you weren't involved in the
4 Bowen case, then?

5 A. Oh, no.

6 Q. And I'll accept an objection to
7 asked and answered, but I just want to make sure
8 I have this clear.

9 Sitting here today, you can't give
10 an approximate number of bad faith claims you
11 handled as an attorney during that roughly
12 10-year period?

13 A. If I just had to guesstimate, I'd
14 say approximately 20.

15 Q. And any of those result in reported
16 decisions?

17 A. Not that I recall.

18 Q. You were appointed to the trial
19 bench in 91; is that right?

20 A. Correct.

21 Q. Who appointed you?

22 A. Governor Guy Hunt.

23 Q. Did you have a relationship with
24 Guy Hunt?

25 A. No.

1 MR. WINSTON: Objection. Calls for
2 speculation. Vague.

3 A. Well, I had a relationship to the
4 extent that six months before I was appointed by
5 him, a vacancy had come open. And we have in
6 Tuscaloosa County a judicial selection committee
7 where the committee winnows out the applicable
8 names and submits three. I was one of three
9 submitted to that vacancy. And Governor Hunt
10 sent word back that I would not be considered
11 because I had given money to his opponent in the
12 last gubernatorial race. So when the next
13 vacancy came about, friends of mine who had some
14 entree with him basically got together and went
15 to call on him and said this is who we want. We
16 think he's qualified. And so I established a
17 relationship at that point.

18 Q. Very good. Did you hear any bad
19 faith cases while you were sitting as a trial
20 judge?

21 A. Yeah.

22 Q. Can you give an idea of how many
23 that would have been?

24 A. I was a trial judge for a little
25 over 10 years. Certainly one a year, but beyond

1 that, I wouldn't feel that it was exaggerating
2 to say two a year. But when you say here, you
3 know, a lot of them might go out on the summary
4 judgment stage. A lot of them I might do all
5 the work up to the point and then they got
6 settled. Bad faith was really beginning to get
7 its sea legs at that time. And probably if you
8 wanted to say "here" meaning that they came
9 before me to some degree, probably 10 a year.

10 Q. Do you recall any reported
11 decisions that came out of your trial work as a
12 judge?

13 A. In dealing with bad faith?

14 Q. Correct.

15 A. No, I do not.

16 Q. Were you elected to the Supreme
17 Court initially?

18 A. Yes.

19 Q. In 2001?

20 A. Actually in 2000 and took office in
21 January 2001.

22 Q. And justices serve a six-year term;
23 is that correct?

24 A. Correct.

25 Q. You served one six-year term?

1 A. Correct.

2 Q. During your term on the Supreme
3 Court, did you hear any bad faith cases? Let me
4 ask a better question. Were you on the panel
5 deciding bad faith cases in that time period?

6 A. I was. Actually the way the Court
7 worked, we didn't deal in panels like the, for
8 example, 11th Circuit does. But rather we were
9 divided into two divisions, four associate
10 justices and the chief justice sits as the fifth
11 member on each. And so if there's a unanimous
12 five-member vote on the division to which the
13 case is referred to initially, it goes out in
14 that fashion. If there's any dissent, question,
15 or somebody just says, I'd like to discuss, then
16 it goes to the entire Court. And then there are
17 a whole category of cases that are required by
18 statute or rule to go to the entire Court
19 initially. So to the extent that sometimes that
20 would be a division case, I did sit on a
21 division that -- and it was my regular division.
22 These things didn't rotate.

23 Q. Do you recall any decisions by name
24 that you sat on?

25 MR. WINSTON: Objection. Are you

1 referring to bad faith cases or just any case at
2 all.

3 MR. LASETER: That's absolutely a
4 good objection. Let me try to ask a better
5 question.

6 Q. During your tenure on the Supreme
7 Court, do you recall any of the names, even a
8 slang name, if you will, for any of the bad
9 faith cases?

10 A. I remember one of them was Brown.
11 And I just recall there were a lot more. One
12 reason I have a little difficulty there is that
13 over the years naturally I've read and reread a
14 lot of bad faith cases. And it's hard for me to
15 remember now which ones I'm so intimately
16 familiar with I just read a lot and which ones I
17 actually participated in.

18 Q. That's fair. And actually you can
19 enlighten me about the inner-workings of the
20 Alabama Supreme Court. I didn't understand
21 before. The two divisions, would those two
22 divisions sit separately to hear oral arguments?

23 A. No. Oral arguments are always on
24 bond.

25 Q. And can you look at a reported

1 Alabama Supreme Court decision and tell from the
2 reported decision which division of justices
3 appeared?

4 A. Yes, because we had what we called,
5 initially when I went on there, the See division
6 and the Houston division, named after the two
7 senior associate justices. The first-most
8 senior associate justice heads up one division
9 and the second-most associate heads up that and
10 they are usually referred to by name in that
11 fashion. So if I looked and saw that Justice
12 See was participating, I know that was the See
13 division.

14 MR. LASETER: And for the court
15 reporter, that's Justice See, S-E-E.

16 A. And sometimes you'd have a judge
17 recused or not be able to sit for some reason
18 and you'll have another judge from another
19 division come in. But nonetheless you could
20 look at the composition and say, okay, that's
21 either the See division or Houston division.

22 Q. Do you recall if you wrote any
23 opinions on bad faith while a Supreme Court
24 justice?

25 A. You know, I wouldn't be surprised

1 if I did, and --

2 Q. Sitting here today, none come to
3 mind?

4 A. No.

5 Q. Sitting here today do you recall
6 dissenting on any bad faith cases?

7 A. Not specifically. But again,
8 that's just a function of that thing I think I'm
9 intimately familiar with bad faith case that
10 happened during that six-year tenure. But then
11 every one that's happened since then, I've read
12 and reread. And it's just -- and also the Court
13 asks me still to sit with them from time to time
14 when there's a disqualification, the number
15 drops down. So I've been recommissioned, I
16 guess you'd say, probably four or five times by
17 the Court. I don't recall any of those were bad
18 faith cases.

19 Q. You're doing a very good job of
20 being one step ahead of my outline here, so
21 thank you for that. Can you tell me how that
22 commissioning process works when you get called
23 back to be a judge?

24 A. Usually it's, the clerk of the
25 court contacts me. Most recently it was the

1 staff attorney for the chief justice. They
2 would say, we've got a case in which we need to
3 have a special justice sit. And either I'd ask
4 or they'd volunteer, here are the facts, here
5 are the parties. I'd run a conflict check
6 within my firm, not giving the details other
7 than, might say this is a breach of contract
8 case because I want to make sure that nobody in
9 my firm has something going on wherein my
10 participation might benefit them. And so if
11 there's no conflict, then I agree to do it.

12 Q. Do you have to do anything special
13 to maintain that eligibility to be called back?

14 A. No.

15 Q. Are there other judges that
16 actively do that now?

17 A. Yeah. They reach out to -- we've
18 got a number of retired justices. So I've seen
19 recently Justice Lyons has sat, Justice Houston
20 has sat. I think maybe former Chief Justice
21 Nabers has sat. A former justice from a long
22 time ago, Janie Shores, I've seen her name as
23 special justice.

24 Q. Are you aware of any other former
25 Supreme Court justices that are currently giving

1 expert testimony in cases among private parties?

2 A. I am.

3 Q. Who are those?

4 A. I know I've seen a situation where
5 Justice Maddox has, Justice Houston has, Justice
6 Nabers, N-A-B-E-R-S, has. I do recall those
7 three. And Justice See, I recall one from him
8 also.

9 Q. How did you come to be aware that
10 they had given expert opinions?

11 A. Because I was also retained as an
12 expert and was given either their report or they
13 were involved in the case.

14 Q. Were any of those cases bad faith
15 cases?

16 A. You know, I don't recall. I don't
17 think so. If I go back in my mind sort of
18 thinking generally about the bad faith cases
19 I've been involved in as an expert, I don't
20 recall that any of them were an opposing expert.

21 Q. Are there any rules of ethics that
22 inform how former judges have to decide whether
23 or not an expert assignment is appropriate?

24 A. Well, certainly you would not
25 participate if the case was one that had

Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood **October 26, 2011**

Page 22

1 formerly come before the court and you had
2 actively participated. That'd just be my rule.
3 I would not.

4 Q. You mean that's not a written rule?

5 A. Yeah. I had a situation where I
6 actually called down to the legal counsel of the
7 State Bar to ask for an advisory opinion because
8 there was a case in which an incidental matter
9 had come before the court when I had sat on it
10 and now a continuation of that litigation was
11 going on and I was asked to serve as an expert
12 witness. And there is a rule in the Canons of
13 -- or rather in the Rules of Professional
14 Conduct that says if you are judge even of a
15 multi-judge court, you cannot act as a lawyer,
16 you cannot represent a matter which previously
17 came before the Court which I think it says
18 substantially participated in. So I called to
19 ask, what's the situation where I'm not
20 representing the party but I'm being asked to
21 serve as an expert. And the answer I got, it
22 was verbally over the phone, is, well, we've
23 dealt with that several times. Our position is
24 that an expert doesn't represent anybody. An
25 expert is supposed to -- they have to give an

1 objective opinion, and so our view and our
2 position is you're not precluded by any of the
3 rules of professional ethics in serving as an
4 expert even if the matter had come before the
5 Court. But I elected in that case not to go
6 forward anyway.

7 Q. Are you aware of any published
8 opinions with regard to ethical constraints, if
9 you will, on expert testimony by former judges?

10 A. I am not.

11 Q. Are you still active in the bar?

12 A. Oh, yes, yes.

13 Q. What sort of roles are you taking
14 on now?

15 MR. WINSTON: Objection.
16 Relevance. If the witness recalls, he can go
17 ahead and answer.

18 A. Well, I'm chair of the advisory
19 committee to the Alabama Supreme Court on the
20 Alabama Rules of Evidence. And that's a
21 committee appointed by the Supreme Court. And
22 we're just wrapping up a two-year study of all
23 the Alabama Rules of Evidence, comparing them to
24 the Federal Rules and going to make in
25 confidence a recommendation to the Court on what

1 changes or updates should be made. By
2 appointment of the Supreme Court, I'm on the
3 Committee for the Alabama Rules of Pattern Jury
4 Instruction for Civil Cases. And I've served on
5 a number of other committees like that. I'm on
6 a committee for the Alabama Law Institute and
7 several subcommittees looking at proposed
8 legislation of different types. We're working
9 on one now dealing with I think, uniform
10 enforcement of foreign judgments.

11 Q. Pretty exciting.

12 A. Yeah, riveting.

13 (Off-the-record discussion.)

14 Q. Let me try to narrow my question
15 about your current bar-related activities. I
16 was trying to understand whether or not any of
17 your current bar activities have anything to do
18 with an insurance sub-group or subcommittee.

19 A. No. I am a member, in the American
20 Bar Association with the exception on insurance
21 on law.

22 Q. Do you have any leadership roles
23 there?

24 A. No.

25 Q. Have you ever had a leadership role

1 in the American Bar?

2 A. No.

3 Q. I know from your reports that
4 you've had various leadership roles in the
5 Alabama Bar and as well as the local Tuscaloosa
6 Bar; is that correct?

7 A. Correct.

8 Q. Let me transition from your
9 background if I can to talk about first some
10 general principles that I think have informed
11 your opinions here and that govern, outline
12 insurance law. First of all, am I correct that
13 it's a principle of Alabama insurance law that,
14 at least absent a statute or a law to the
15 contrary, that words in an insurance policy
16 where clear will be given their plain meaning?

17 A. Correct.

18 Q. Is it also correct that the defense
19 obligation is generally understood to be broader
20 than the indemnity obligation in liability
21 policies?

22 A. Correct.

23 Q. Is it also correct that an
24 ambiguity is understood to exist when either a
25 term isn't clear or whether there are two or

1 more possible meanings for that term?

2 A. Correct.

3 MR. WINSTON: Well, give me time to
4 object. I would object to that question both on
5 the grounds of compound and also calling for
6 legal collusion.

7 Q. Is it also correct that
8 ambiguities, as we just defined them, are
9 construed in favor of finding coverage.

10 A. I would say ambiguities are
11 construed in favor of the insured. Whether that
12 second construction results in a finding of
13 coverage would be a secondary consideration.

14 Q. So it would be better to say that
15 ambiguities are construed in favor of the
16 insured?

17 A. Correct.

18 Q. And likewise, with regard to the
19 duty to defend, doubts about whether there's a
20 duty are resolved in favor of the insured?

21 A. Well, doubts if there's an
22 ambiguity.

23 Q. How about doubts with regards to
24 factual matters?

25 MR. WINSTON: Could you read back

1 that question?

2 THE COURT REPORTER: Let's go back
3 and listen to it.

4 MR. LASETER: If you will, to save
5 time let me --

6 Q. The preceding question was a
7 question about whether or not doubts with regard
8 to the existence of a duty to defend were
9 resolved in favor of the insured. And you
10 answered that, I believe, by saying it depended
11 on whether it was a question of law or excuse me
12 policy interpretation or the facts. Did I get
13 that right?

14 MR. WINSTON: Objection.

15 A. No. I said if there was an
16 ambiguity, you would construe the ambiguity
17 favorably to the insured.

18 Q. And then with regard to an
19 uncertainty or a doubt with regard to a factual
20 situation, should that also resolved in favor of
21 finding a duty to defend?

22 A. Basically the duty to defend is a
23 function of what the circumstances described in
24 the complaint.

25 Q. Are you familiar with the term,

1 "the four corners test"?

2 A. Right.

3 Q. And what you just described is the
4 four corners test?

5 A. Correct.

6 Q. Alabama also recognized an
7 obligation to look beyond the complaint?

8 A. Alabama said, the best I can
9 paraphrase it, is that if facts come to the
10 attention of the insurance company, it would
11 show coverage despite the fact they're not clear
12 in the complaint. Then they should consider
13 those also. But you start out with the fact
14 that if you've got a complaint you look to the
15 facts or circumstances described in that
16 complaint.

17 Q. And to be sure I understand what
18 you're saying -- to be sure I understand the
19 distinction I think that you're drawing, are you
20 familiar with something, a term called "the
21 eight corners test"?

22 A. Not by that name.

23 Q. Are you familiar with the practice
24 of defending, of insurance companies defending
25 cases under reservation of rights?

1 A. Correct.

2 Q. Can you explain why insurers do
3 that?

4 A. If an insurance company is
5 uncertain as to the duty to defend or just as a
6 pragmatic decision it decides it would be
7 helpful to go forward and be involved in the
8 defense, then it can either send a reservation
9 of rights letter to the insured or enter into a
10 nonwaiver agreement with the insured. But
11 essentially what the reservation of rights
12 letter says is that we'll go ahead and enter
13 into a defense but we're doing so without
14 prejudice to our rights to later withdrawal from
15 counsel. In other words, not waiving any of the
16 reasons we might have for not providing a
17 defense or not indemnifying just by entering
18 into the defense.

19 Q. Is it possible for an insurance
20 company in Alabama to enter into a defense under
21 reservation of rights and then seek a
22 declaratory judgment on the uncertainty?

23 A. It is.

24 Q. Is that common?

25 MR. WINSTON: That's too vague.

1 A. I don't know that I'd say it's
2 common. It happens.

3 Q. Have you been involved in cases out
4 of trial court or Supreme Court where the issues
5 involved a -- there's a fact pattern involved, a
6 company having entered a defense under
7 reservation of rights and then sought a
8 declaratory judgment?

9 MR. WINSTON: Objection. Vague.
10 You mean the insurance company?

11 MR. LASETER: Correct.

12 A. Yeah, I can recall situations like
13 that.

14 Q. Do you recall any of them by name?

15 A. No, I don't.

16 Q. Continuing on with some more
17 general points, I understand from your report
18 that you believe that California law is
19 articulated in the Foster case -- and by the
20 Foster case, I mean the case that you cited in
21 your report. It essentially mirrors the
22 counterpart standards for policy interpretation
23 of Alabama law, is that --

24 A. Yeah, a lot of the sort of tests or
25 rubrics, they referred to as informing their

1 approach to the analyses of the ones I'm used to
2 seeing Alabama courts adopt.

3 Q. In the process of formulating your
4 opinions for this case, did you evaluate the
5 degree to which, to pick a state, Illinois'
6 approached to insurance problems mirrored the
7 standards in Alabama?

8 MR. WINSTON: Objection. Vague.

9 A. As I read some of those cases, I
10 probably noted that, but I didn't make an
11 intentional sort of comparison or checklist.

12 Q. And so the same thing would be true
13 with any of the other jurisdictions where you
14 reviewed the cases. You didn't make a specific
15 comparison to see whether they were to the same
16 degree, more, or less, or similar than
17 California in Alabama?

18 MR. WINSTON: Object to the form.

19 A. I would've noted it as I read the
20 opinion, but I didn't retain it to the extent of
21 trying to say, okay, this state did it this way
22 or this state did it that way.

23 MR. LASETER: And Mr. Winston,
24 other than perhaps me mumbling, can you explain
25 the form or objection of that question.

1 MR. WINSTON: It was compound on
2 multiple levels. It was leading, and it was
3 vague.

4 MR. LASETER: I think I get to lead
5 him. Let me see if I can break it down so that
6 it's not compound.

7 Q. And I think your answer is clear
8 enough. But did you evaluate whether any of the
9 other jurisdictions were less similar to Alabama
10 law with regard to approach to insurance policy
11 evaluation in California?

12 A. I would've gained that impression
13 as I was going through the case, but I don't
14 retain it as far as any particular state.

15 Q. And likewise you didn't evaluate
16 whether any other jurisdiction was equally as
17 similar to Alabama as California?

18 A. No.

19 Q. And likewise you didn't evaluate
20 whether any other jurisdictions were less
21 similar to Alabama law than California law?

22 A. No.

23 Q. In the course of preparing your
24 opinion in this case, did you review any
25 decisions that were critical of that Foster

1 decision?

2 A. Well, I read pretty much the whole
3 body of cases that you all variously have cited.
4 But I don't recall specifically now which ones
5 came after it and took note of it.

6 Q. I may not have asked a good
7 question. I meant to ask you whether you recall
8 reading a case that was expressly critical of
9 Foster?

10 MR. WINSTON: Objection. Asked and
11 answered.

12 A. Not as such.

13 Q. Do you recall the Porterfield
14 decision that you authored?

15 A. I remember that name. You'll have
16 to give me a little better guidance on which one
17 it was.

18 Q. I believe Porterfield, the Autobahn
19 Insurance Company?

20 A. Autobahn, I do.

21 Q. In that case I believe you observed
22 that whether or not courts in other
23 jurisdictions have reached differing views with
24 regard to the interpretation of the term is at
25 least some evidence with regard to whether or

1 not that term was ambiguous?

2 A. Yeah, among all the different thing
3 you might consider, if you entertain the idea
4 that there's an ambiguity -- of course since you
5 mentioned the four corners test, if you decide
6 there's no ambiguity, then you don't start
7 looking to extrinsic evidence like that.

8 Q. But assuming that you have decided
9 that there could be an ambiguity and you're
10 looking whether or not other courts in other
11 jurisdictions have reached different opinions is
12 at least some evidence of that ambiguity?

13 A. Well, I would say that you'd want
14 to read their opinions and see what analysis and
15 reasoning they used, not just a numerical count,
16 but to see can you gain any further incite by
17 saying the rationales they employed.

18 (Off-the-record discussion.)

19 Q. Judge Harwood, I'm showing you
20 what's been marked Harwood Exhibit number 1. If
21 you'd take a moment and look that over and let
22 me know when you've had a chance.

23 A. Right.

24 Q. Is Exhibit 1 your expert report in
25 this case?

1 A. It is.

2 Q. Are there any additions or changes
3 you want to make to that?

4 A. No.

5 Q. I don't have a particular question
6 about it right now. I was just using this
7 moment to go ahead and mark it.

8 A. Okay.

9 (Whereupon, Exhibit 1 was marked
10 for identification.)

11 Q. Am I correct of whether or not an
12 insurer had a debatable reason for refusing
13 coverage is one of the elements of the tort of
14 bad faith breach of insurance contract in
15 Alabama?

16 A. I agree.

17 Q. And that's actually an element of
18 what's called normal bad faith?

19 A. It's an element of normal bad
20 faith. It's also an element of abnormal bad
21 faith.

22 Q. Is whether or not a reason given by
23 an insurance company for denying coverage is
24 debatable a jury question?

25 A. It has been treated as such.

1 Q. In your view is that something that
2 would be better decided by a judge?

3 A. Well, to the extent it's based on
4 the factual mix of what was going on at the time
5 the decision is made. There are probably always
6 going to be factual questions involved. So it's
7 best, I guess, a mixed question of fact and law.

8 Q. Is bad faith measured from the time
9 that the insurance company denies the claim?

10 A. Yeah. I think it's sort of like
11 you take a snapshot at that point. What did the
12 insurance have before it in reaching that
13 decision.

14 Q. In other words, information
15 developed after the time they denied coverage
16 shouldn't be considered in deciding whether or
17 not they had a debatable reason at the time they
18 denied?

19 A. Alabama Supreme Court has said
20 that.

21 Q. Have you read or at least reviewed
22 the pleadings in this case?

23 A. I have.

24 Q. Are you aware that Judge Johnson
25 has already ruled that a PRP letter -- strike

1 that. Do you understand what the term "PRP
2 letter" means?

3 A. I do.

4 Q. Are you aware that Judge Johnson
5 has already ruled that a PRP letter is a suit in
6 Alabama law for purposes of this case? And if
7 it helps, I'm referring to the summary judgment.

8 A. Yeah, I have her order, and I
9 was -- and I want to look at the exact way. She
10 just says that she -- for all of the reasons she
11 expressed -- was followed the majority of other
12 states and find that the PRP letters satisfy the
13 EPA to the plaintiff, falls within the broad
14 definition of suit and thus triggers the
15 defendant's duty to defend.

16 Q. I assume you don't plan in this
17 case to tell Judge Johnson that she was wrong in
18 issuing that opinion?

19 A. Say that to a federal judge? No.

20 Q. And I assume you don't plan to tell
21 the jury that Judge Johnson was wrong in issuing
22 that opinion.

23 A. No. I think Judge Johnson takes
24 one view of the debate.

25 Q. Do you consider yourself to be any

1 better qualified than Judge Johnson to help the
2 jury understand how to determine whether or not
3 Travelers had a debatable reason to deny
4 coverage?

5 MR. WINSTON: Objection.
6 Argumentive.

7 A. Well, I don't think Judge Johnson
8 has reached that issue.

9 Q. That seems right to me too and so
10 my question is whether you think that you're any
11 better qualified to help the jury with that than
12 she would be.

13 A. Well, I think under I guess Rule
14 702 of the Federal Rules of Evidence, if,
15 drawing on my specialized knowledge, my opinion
16 would be helpful to the trier of fact or the
17 finder of fact, even though it relates to an
18 ultimate issue, then it's permissible as an
19 expert opinion. But that's all subject to Judge
20 Johnson's opinion. I mean, she'll decide
21 whether mine or anyone else's expert opinion
22 would be helpful to the jury in the
23 circumstances.

24 Q. And I believe this is inherent in
25 your earlier testimony, but I want to be sure.

1 Your abilities to offer opinions with regard to
2 the bad faith at issue in this case are based on
3 your legal knowledge and expertise; is that
4 right?

5 A. Yeah, and my having been present,
6 you might say, at the beginning when the tort of
7 bad faith began to emerge. I followed it along,
8 watched its evolution, seen the contours or its
9 shape. So I guess what I'm saying is, having
10 lived with it intimately as lawyer, trial judge,
11 and Supreme Court Justice, I feel that gives you
12 a pretty good prospective.

13 Q. And simply to be sure that I'm
14 clear on this, you're not suggesting that your
15 ability to offer an opinion on that is grounded
16 in any way in experience in the insurance
17 industry aside from acting as a lawyer
18 representing insurance companies?

19 A. I would generally agree with that.
20 I've had a lot of experience, quote, in the
21 insurance industry simply because when I came
22 along you didn't have as much of a separation as
23 what you might now have. I mean, I did
24 basically what was adjusting work a lot in my
25 earlier career. Insurance companies would call,

1 we've had a wreck. Go out and take statements.

2 Q. But they were hiring you as a
3 lawyer to go out and do that, not as an
4 adjustor?

5 A. Right. But I'm just saying that
6 you were assigned a lot of tasks that an
7 adjustor or a claims superintendent might do. I
8 think the cleavage is now more distinct. They
9 respect the fact that you're the lawyer and this
10 is the claims department. So I went to claims
11 meetings. I went to -- there was a monthly
12 meeting of all the claims representatives that
13 everybody attended in Birmingham. And I, along
14 with some of the adjustors from there, would
15 drive up there. So I had that sort of insight
16 participation, but I was never formerly a part
17 of any claims committee. And as I said earlier,
18 I was never employed by an insurance company as
19 such.

20 Q. Turning now to Exhibit 1 -- and I'm
21 not asking you to look at any particular part.
22 But I'm going to ask you some more specific
23 questions about your opinion now. And if it
24 helps to refer, please feel free to. In looking
25 at the report, do I understand correctly that

1 you'll offer an opinion Travelers did not act in
2 bad faith in this case?

3 A. Yes.

4 Q. Do I also understand correctly that
5 you'll offer an opinion on the relationship
6 between the term "suit" as it appears -- and
7 suit should probably be in quotations marks --
8 "suit" as it appears in the policy and the word,
9 "claim" that appears in the policy?

10 A. Well, to the extent that I
11 addressed that in the report, yes.

12 Q. And if I understand the way you
13 address it in the report, you'll offer an
14 opinion that the policy language makes a
15 distinction between the term "suit" and the term
16 "claim"?

17 A. Right. Consistently throughout the
18 policy, anytime either of those terms is used,
19 that distinction is honored.

20 Q. I'll alert you in advance that this
21 may be a complicated-sounding question, and I'll
22 do my best. Did I also understand correctly
23 that you will offer an opinion that under
24 Alabama juris prudence that Court will put more
25 -- and by court I mean the Alabama Supreme Court

1 -- will put more weight on what it views to be
2 the better reasoned approach rather than looking
3 to the weight of majority versus minority
4 decisions on a given issue elsewhere?

5 A. Yeah, I think rather than just
6 doing the counting of noses, the Alabama Supreme
7 Court would look to the underlying reasons and
8 rationales and adopt that which appeared to be
9 the -- as they've used the term,
10 "better-reasoned" approach.

11 Q. And finally, am I correct that
12 you'll offer an opinion that Travelers' basis of
13 denial was at least debatable under Alabama law?

14 A. Correct.

15 Q. And if it helps to take a moment
16 and look through your report -- I believe I've
17 summarized your major points. And by asking
18 this question I don't mean to try to exclude any
19 particular sentence here, but is that a fair
20 summary of your major points?

21 MR. WINSTON: Well, objection. The
22 document speaks for itself.

23 Q. Let me try to ask a better
24 question. Are you aware of major points of your
25 opinion that I've omitted in this list I just

1 gave?

2 MR. WINSTON: Same objection.

3 A. I really can't assign major in
4 minor. The opinions I've expressed are all laid
5 out there. I can't really champion them in a
6 hierarchy.

7 Q. Fair enough. I'm sitting here
8 today, having not thoroughly read this report,
9 are there points you believe important that that
10 I have not articulated here?

11 MR. WINSTON: Objection. It's
12 cumulative. The document speaks for itself.

13 A. Well, I don't say there it is, but
14 I'm just saying if it's in the report, then I
15 consider it worthy of consideration as part of
16 my opinion.

17 Q. And fair enough. And my reason for
18 asking those questions is that often times --
19 and I've actually seen this in some of your
20 prior reports -- expert witnesses will give sort
21 of a summary bullet of their opinions and then
22 follow that with a more detailed analysis. In
23 this case you didn't do that, so I'm just trying
24 to be sure I understand sort of in a summary
25 fashion what your opinions will be.

1 MR. WINSTON: Is that a question?

2 Well, objection. There's no question.

3 MR. LASETER: I'll put a question
4 mark at the end of that. No. It was simply an
5 explanation for the last question I've been
6 giving.

7 Q. And my reason for trying to ask you
8 whether or not what I had done would be a
9 reasonable summary of those major points, again
10 not meaning to exclude the underlying, or
11 anything left out.

12 MR. WINSTON: Let me just object
13 because it's been asked and answered and also
14 because the document speaks for itself.

15 A. I mean, I could elaborate on a lot
16 of the things that are in the opinion, or rather
17 in the report, but I don't have some sag issue
18 that I anticipate interjecting that's not
19 foreshadowed in the report.

20 Q. But if it's foreshadowed in the
21 report, you do intend to testify about it at
22 trial?

23 A. Yeah, and I don't mean that there's
24 something lurking that I sort of hinted at that
25 I've held back. But I would just say that if

1 you're on the stand for some length of time,
2 just like in this deposition, you'd begin to
3 have elaborations upon things in the report.

4 Q. Fair enough. Let me shift gears
5 slightly to one of these sub points which is the
6 question of the weight of majority versus
7 minority opinions. You cite the attorneys
8 insurance case in here. Do you recall that?

9 A. Uh-huh.

10 Q. Do you recall the facts of the
11 attorneys insurance case?

12 A. I think it related to whether you
13 had to show prejudice in connection with late
14 notice to the insurance company.

15 Q. And there was a particularly
16 peculiar term in the policy that hadn't been
17 addressed in Alabama; is that correct?

18 MR. WINSTON: Objection. The
19 opinion speaks for itself. The question is
20 vague.

21 Q. And is your understanding that that
22 same issue had not been addressed in any other
23 jurisdiction?

24 MR. WINSTON: Same objection.

25 A. I don't recall that aspect of the

1 case.

2 Q. You don't recall one way or
3 another?

4 A. No. I know it was an issue for the
5 Alabama Supreme Court to decide whether there
6 had been any other court that had decided, but I
7 don't think that ever entered into it.

8 Q. Do you recall having read the
9 Alabama Plating case?

10 A. I do.

11 Q. Do you recall in that case that
12 there were actually two points on which the
13 Court was looking to other jurisdictions for
14 some clarification?

15 MR. WINSTON: Objection. The case
16 speaks for itself.

17 A. I generally recall that.

18 Q. Do you recall what those issues
19 were?

20 A. One had to do with whether damages
21 as used in the CGL policy would embrace the idea
22 of ordered cleanup costs I believe. I believe
23 it was the EPA in that case, or maybe it was the
24 state ADEM agency. I really don't know. But
25 the idea of whether damages, that term as used

1 in the CGL policy, would cover those sort of
2 cleanup costs.

3 Q. Can you recall any other issues?

4 A. Seemed it had to do with things
5 relating to boiler policies. It seemed to me I
6 remember there was discussion of the fact that
7 certain courts had interpreted, that the courts
8 had uniformly interpreted a phrase a certain
9 way, that is, there wasn't any split, but just
10 that was the uniform interpretation. Therefore
11 when the insurer drafted and issued a policy
12 using that term, it would presumably have known
13 that the judicial gloss on it would've indicated
14 that that was the interpretation that would be
15 accorded to it.

16 (Off-the-record discussion.)

17 Q. Do you recall in the Alabama
18 Plating decision the Alabama Supreme Court using
19 the term "a narrow majority"?

20 A. I do.

21 Q. Do you know what count of
22 jurisdictions it called the narrow majority?

23 A. I don't recall.

24 Q. Do you recall them describing
25 another majority as a clear majority?

5 A. I don't recall that.

12 A. Well, again I would say not on the
13 basis of numerical account but on the basis of
14 reading those opinions. And obviously if it had
15 garnered that much support or there was uniform
16 support, the underpinnings of its logic
17 rationale must be pretty competitive. So that's
18 what I think would persuade the Alabama Supreme
19 Court, not just the numerical account.

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23 A. That's something the Court looks at
24 from time to time. And it's a mix. They look
25 at a lot of different things. And I have seen

1 cases where the trend, particularly if you had a
2 lot of cases from maybe turn of the century or
3 at a different time and then subsequent to then
4 the clear trend is away of from that, that's
5 something you consider.

6 Q. And you cite in your report an area
7 of insurance law in which Alabama has existing
8 jurisprudence in a minority of jurisdictions
9 around the country. Do you recall that?

10 A. I'm sorry. You're going to have to
11 repeat that question. Or maybe you can just
12 refer me --

13 Q. Yeah, let me see if I can find it
14 in your report. I'm looking on page 4 in the
15 last sentence of the first paragraph on the
16 page. It says, "the Court is not reluctant."
17 Do you see that sentence?

18 A. Right.

19 Q. And the significance of that, if
20 I'm understanding correctly, is that there are
21 at least some examples where Alabama
22 jurisprudence would be within the minority rule
23 across the country on insurance issues?

24 A. Yeah, in that case involving the
25 insurance law issue, that's the one I thought

1 you were referring to earlier when I said I
2 recalled a case when we had a minority position
3 on both need to show prejudice. So if that
4 wasn't the case you were referring to, then that
5 answer was misplaced as far as the facts of the
6 case.

7 Q. And then to try to clarify, with
8 regard to the position in Midwest Employers
9 Casualty Company, the one cited here in your
10 report, that was a situation where there was an
11 existing line of cases in Alabama rather than a
12 situation where the Court was looking at an
13 undecided issue on Alabama law; is that right?

14 A. Right. So the fact -- the whole
15 line of cases or the line of cases in Alabama
16 was reaffirmed despite the fact that it
17 represented a minority view.

18 Q. And in all of your research and
19 preparation for this case and your familiarity
20 with Alabama insurance law, are you aware of any
21 situations where the Alabama Supreme Court has
22 adopted in a decision addressing an insurance
23 question the first impression of Alabama what
24 constitutes a minority view across the country?

25 A. Nothing comes to mind.

1 Q. Turning to page 6 of your report,
2 one of the Rule 26 questions posed is a listing
3 of publications in the last four years. I don't
4 see any listed here. Am I correct that you
5 haven't had any published papers or books or the
6 like in the last four years?

7 A. I guess it depends on what you mean
8 by published. I've given -- in fact I got an
9 award at the Bar meeting about three years ago
10 for having given over 200 CLE presentations.
11 I've given six this year and am giving one
12 November the 2nd, I think. So you always have
13 to have -- and I try to have very elaborate
14 handouts because otherwise they can't get their
15 CLE credit. And these are published in booklet
16 forms that go out to all the attendees or
17 anything when that started. So to that extent
18 published, but not in the sense of Treatise law
19 review article or anything like that.

20 Q. Where regard to those papers, or
21 written materials that you just described, have
22 any of those addressed bad faith?

23 A. In years past they have. I
24 remember I was asked give a -- back when I was
25 practicing law, so this would be the first 20

1 years of practice, to the Alabama Circuit of
2 District Court Judges Association which I did on
3 bad faith. And there was a paper that went with
4 it and an oral presentation.

5 Q. And is that paper preserved
6 somewhere to your knowledge?

7 A. Not that I know of.

8 Q. And it's not in some compendium of
9 CLE books that you know of?

10 A. No. And, frankly, given its age, I
11 doubt that any of the judges would have retained
12 it because it would be somewhat dated now. I
13 would think a lot of it still held true, but
14 nonetheless a lot of water has gone under the
15 bridge since then.

16 Q. And any other presentations that
17 you can recall where you gave out materials that
18 the subject matter would have been an insurer
19 bad faith?

20 A. You know, I think their have been
21 more than one back during that time. I know
22 there were, but not preserved as you said in
23 some sort of compendium.

24 Q. And to be sure I understand the
25 limitation you're making. Since the time you

1 took the bench as a Supreme Court justice, you
2 haven't made a presentation in which there would
3 be written materials on the topic of bad faith?

4 A. I don't believe so.

5 Q. Looking at page 6 of your exhibit,
6 I see five cases listed here. Could we just
7 walk down these cases, starting with Gary
8 Dewayne and it's Shearin, S-H-E-A-R-I-N, case
9 and have you tell me what that case was about?

10 A. The best I can recall that was a
11 situation where an insurance policy had been
12 financed through a finance group and as part of
13 the paperwork involved in that relationship the
14 finance group was given the authority to cancel
15 the policy if premiums weren't paid to it.
16 Premiums were not paid to it. It sent notice to
17 the carrier who cancelled the policy. The
18 insured then cured the default. The finance
19 company accepted and at some point in time sent
20 notice to the insurance company, we want to in
21 effect reinstitute the policy. And the
22 insurance company took the position, well, we
23 don't have to honor that.

24 Q. And what topic or subject did you
25 give an opinion on in that case?

1 A. I'm not sure if it was that one or
2 that one and another one. But at one point I
3 relied on the fact we've got a line of Alabama
4 cases that say that improper or negligent
5 wrongful cancellation of the policy is not bad
6 faith. It's separate area of the law. There
7 may have been other issues involved in that
8 Shearin case. It shows the case number that the
9 case was filed in '05. I don't remember just
10 when I did it, but that was -- I didn't come off
11 the Supreme Court bench until January '07, so
12 sometime probably early on in that time is when
13 I was approached.

14 Q. Am I understanding correctly,
15 though, that although this may have involved
16 something normally described as bad faith, it's
17 not the normal, abnormal bad faith line of cases
18 that we're talking about in this case?

19 A. Yeah, I think so.

20 Q. I'm going to ask a term in slang to
21 make this easier. If this is objectionable, we
22 can do it more formally. But can you tell me
23 which side of that case you were on?

24 A. I was retained by the insurance
25 company. Better said, I was retained by counsel

8 MR. WINSTON: Why don't you just
9 ask him whether he represented the policyholder
10 or the insurance company?

14 A. Well, I recognize the reality, you
15 approach, you're paid by somebody. But I don't
16 consider myself as representing them.

18 A. I mean, I have turned -- I have had
19 a lot of people hire me. I give an opinion.
20 They say, thanks, we'll get back to you if we
21 need you and I know they didn't like the
22 opinion.

25 A. I think so. The one where it

1 actually reached a point where I gave, what this
2 question asked about, either trial or
3 deposition. There had been others where I'd
4 given opinions. I know one where I did a
5 lengthy written opinion not too long ago.
6 Apparently that part of the lawyers carried the
7 day and they got summary judgment and it's no
8 longer involved.

9 Q. I may have asked a bad question. I
10 was trying to find out whether this was the
11 first time that you had given an opinion the
12 best you can remember sitting here today.

13 A. It would have been one of the early
14 ones. But I don't remember, if you consider
15 written opinions, if you've done that didn't
16 involve --

17 Q. I understand.

18 A. -- deposition testimony.

19 Q. I understand your clarification.
20 Thank you. Let me read down the next one.
21 United American Resources. What was that case
22 about?

23 A. That involved what was known as a
24 coal mine role up, which is sort of a term of
25 art where the company was collecting a lot of

1 coal mine leases and was going to try to put
2 together a big project. One of the other
3 parties, we'll just use the term loosely,
4 interfered with their opportunity to do it. The
5 deal fell through so they sued them for having
6 killed the deal. And they were seeking to
7 recover all of their due diligence expenses;
8 attorneys' fees and other things that they had
9 done in putting the deal together. So I was
10 asked an opinion on which of these matters would
11 be appropriate attorneys' fee work as a part of
12 the due diligence you should do in that sort of
13 situation.

14 Q. Were you retained by counsel for
15 the plaintiff or for the defendant in that case?

16 A. Would have been counsel for the
17 plaintiff United American Resources.

18 Q. Was there an insurance element
19 involved in that case?

20 A. Not that I recall. Certainly my
21 involvement in it didn't touch on insurance.

22 Q. The next one down is Ali Eslami,
23 E-S-L-A-M-I, and Ali is A-L-I. Could you tell
24 me what that case is about?

25 A. That is a case where I was asked by

1 the attorneys representing Mr. Eslami to give an
2 opinion as to whether it was potentially bad
3 faith for the insurance company in that case
4 Allstate Insurance Company to have denied him
5 coverage or payment under a homeowners policy,
6 or maybe it was a casualty policy, where his
7 home burned down. They denied coverage on the
8 basis they thought there was sufficient evidence
9 of arson driven principally by what they thought
10 they had found out about his financial
11 circumstances as a result of the EUO thing, the
12 examination under oath. And during that
13 examination they never really inquired of him
14 about what other assets he had, did he have a
15 savings account, was this paid for. And based
16 on the fact that they felt that he had certain
17 mortgage payments or other debt -- I forget the
18 exact picture -- they decided that was enough to
19 show that he had financial need and therefore
20 had a motive and they denied the coverage. My
21 opinion was that given the assertion as it was
22 made by the plaintiffs that he had ample other
23 assets, that he wasn't in a bind, if they had
24 just investigated and looked into that, they
25 would've found that out, that that was

Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood October 26, 2011

Page 60

1 potentially was bad faith. Failure to
2 investigate type of bad faith.

3 Q. An abnormal bad faith?

4 A. Right.

5 Q. And what happened in that case?

6 A. I'm not sure. At one point the
7 lawyer who retained me, Judge Johnson's son,
8 told me that some conflict had developed and he
9 was going to have to refer the case to someone
10 else. And I've just not -- whether it's gone
11 away, whether it's gone forward, I don't know.

12 Q. You issued a report and gave a
13 deposition in that case?

14 A. I know I issued a report, and
15 obviously if I've listed it here, I gave a
16 deposition.

17 Q. You didn't testify at trial, then,
18 though?

19 A. No, it's not gone to trial.

20 Q. And I should've asked this about
21 United American Resources. Did you testify at
22 trial there?

23 A. No. As far as I know, it's still
24 meandering along.

25 Q. Did you testify at trial in the

1 Gary Dewayne Shearin case?

2 A. No. Again, don't know what ever
3 happened to it.

4 Q. Moving back down to the Hartford
5 Fire Insurance Company, the fourth one listed,
6 can you describe that case for me?

7 MR. WINSTON: Let me object. The
8 fourth one down, you're calling it Hartford
9 Fire?

10 MR. LASETER: Yeah, there's not a
11 space between --

12 MR. WINSTON: Okay. I see what
13 you're saying. Got it.

14 A. That was sort of a convoluted
15 situation. I'll tell you the best I can recall.
16 It was alleged that there had been bad faith in
17 the refusal of the insurance company, which was
18 Hartford, to pay a theft claim or embezzlement
19 claim. It was a lot of different claims of
20 misdoing by an employee of a company with
21 respect to payment under the fidelity bond. The
22 plaintiffs retained an expert. And the expert
23 opined in the end that, well, what the bad faith
24 really consisted of. He said, I'm not going to
25 offer an opinion on that. What I say the bad

1 faith was, was that the insurance company,
2 Hartford, having interviewed several principles
3 within the company then later shared some of
4 that information with the plaintiff's lawyer,
5 the plaintiff being the fired employee who had
6 sued or countersued saying actually, I'm owed a
7 lot of money and they knew I was doing these
8 sorts of things. It was all a part of this
9 freewheeling approach I was taking.

10 The Hartford and the attorneys for
11 the company, that is Mitchell Company, had
12 entered into an agreement and said, we'll share
13 all this information and we'll keep it
14 confidential, except if there's any litigation
15 between us, then that's -- we're at liberty to
16 use that information.

17 So the plaintiffs sued for bad
18 faith on this first theory. Hartford then at
19 some point talking to the employee's lawyer
20 trying to get together with the situation,
21 shared some of the information it had gained in
22 those interviews. The expert testified in his
23 deposition, that's the bad faith I'm talking
24 about. You should not have shared that
25 information. So my opinion was, well, if that's

22 Q. And I think this is implicit, but
23 you were retained by counsel for the insurance
24 company in that case?

25 A. Right.

Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood October 26, 2011

Page 64

1 Q. And then lastly on the list is
2 Category 5 Management Group, LLC?

3 A. Uh-huh.

4 Q. Can you tell me what that case was
5 about?

6 A. National Casualty Company, I think,
7 was the primary company and Ace American Made
8 was excess. But at any rate they had a total,
9 as I recall, 4 million liability coverage for
10 this trucking company. An employee of the
11 trucking company was involved in a wreck driving
12 a company truck but supposedly on his personal
13 business. He was going over to another area to
14 pay a fine. As I recall he didn't have a
15 driver's license. He was drinking. He had
16 cocaine in his system and he ran a red light and
17 hit a car in which the mother, who was the
18 driver, was killed, and a 3-year-old child was
19 rendered a quadriplegic. Very serious case.
20 Very serious liability.

21 So the insurance companies, on
22 behalf of their named insured and another
23 company who would qualify as an additional
24 insured reached out to the plaintiff's lawyer
25 and said, we'll tender our policy limits. The

1 plaintiff's lawyer said, at this point it's
2 premature. I don't want to settle anything.
3 I've got a child's case. I don't know what
4 other companies I may find that have some
5 involvement, because these companies were all
6 involved in hurricane cleanup and they sub out a
7 lot of work. So there was a whole constellation
8 of different companies involved. After that
9 while the insurance companies were still trying
10 to work out a, you know, take our offer, this is
11 all we've got-- and the insurance policies had
12 an exhaustion of benefits division. Once we've
13 exhausted out coverage, then we don't have any
14 duty to defend. A third company surfaced and
15 said, I think I qualify as an additional insured
16 under some of these descriptions. At that point
17 the plaintiff's lawyer let the insurance company
18 lawyers know, I'm ready to settle now. I'm
19 ready to take your offers. So they settled on
20 behalf of the two insured they proffered it for
21 and then denied a defense to the third one,
22 saying, we've exhausted limits. Its contention
23 was, you should never have exhausted the limits
24 without taking care of all the insureds,
25 therefore it's bad faith.

1 And my opinion was that under the
2 circumstances that existed and given the way the
3 negotiations went, it was not bad faith to honor
4 the primary needs of the first two insureds and
5 pay off the policy limits and then the policy
6 provision of exhaustion of coverage was due to
7 be honored.

8 Q. Were you retained by counsel for
9 the primary policy in that?

10 A. They were working together. I
11 think they put together an aggregate of 4
12 million primary and excess. There was never any
13 distinction between the two insurance companies.

14 Q. But you were hired by the counsel
15 for the insurance company?

16 A. Correct.

17 Q. Are there any other, aside from the
18 case you're testifying in today, are there any
19 other cases not listed on this where you've
20 given deposition or trial testimony?

21 A. No.

22 Q. And I failed to ask with regards to
23 the Hartford case whether you testified at
24 trial.

25 A. It has not gone to trial as far as

1 I know.

2 Q. How about the Category 5 case?

3 A. I was told I had trial testimony
4 they were trying to line me up for, and then I
5 got a fairly brief e-mail saying, we've gotten
6 summary judgment.

7 Q. Have you ever testified at trial as
8 an expert?

9 A. No. Well, you say as an expert. I
10 mean, back during my first time, attorneys fees
11 and that sort, but never really anything in bad
12 faith.

13 Q. And that first time, you're
14 referring to before becoming a judge?

15 A. Right, the first 28 years.

16 MR. WINSTON: Why don't we take a
17 short break here if we can? I think we've been
18 sitting here quite a while.

19 (Whereupon, a break was had from
20 10:21 a.m. until 10:31 a.m.)

21 MR. LASETER: I have no more
22 questions.

23 MR. WINSTON: I have no questions.
24 We will read and sign the transcript. I will
25 also note that I would like to designate it as

1 confidential, a protective order in the case.

2 As always Mr. Laseter will deal with that
3 separately.

4 MR. LASETER: And just for the
5 record, to clarify, I'll understand that to be a
6 request to have the transcript, when prepared,
7 made a confidential document under the
8 protective order. And I'll give you a response.

9 MR. WINSTON: We will read and
10 sign.

11
12 (Deposition concluded at 10:33 a.m.)

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14 FURTHER THE DEPONENT SAITH NOT

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1 C E R T I F I C A T E

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3 STATE OF ALABAMA

4 JEFFERSON COUNTY

5

6 I hereby certify that the above and
7 foregoing deposition was taken down by me in
8 stenotypy, and the questions and answers thereto
9 were reduced to typewriting under my
10 supervision, and that the foregoing represents a
11 true and correct transcript of the deposition
12 given by said witness upon said hearing.

13 I further certify that I am neither
14 of counsel nor of kin to the parties to the
15 action, nor am I in anywise interested in the
16 result of said cause.

17

18

19 APRIL SARGENT

20 COMMISSIONER-NOTARY PUBLIC

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A				
abilities (1)	41:11 45:17,22 52:22	Alabama (55)	answered (4)	1:20 2:5 5:1 69:19
39:1	addressing (1)	1:2,7 5:3,5,8,23	13:7 27:10 33:11	area (7)
ability (1)	51:22	6:16 17:20 18:1	44:13	9:11 10:6,20 12:21
39:15	ADEM (1)	23:19,20,23 24:3	answers (1)	50:6 55:6 64:13
able (1)	46:24	24:6 25:5,13 28:6	69:8	Arendall (1)
18:17	adjusting (1)	28:8 29:20 30:23	anticipate (1)	5:7
abnormal (3)	39:24	31:2,7,17 32:9,17	44:18	Argumentive (1)
35:20 55:17 60:3	adjustor (2)	32:21 35:15 36:19	anybody (3)	38:6
absent (1)	40:4,7	37:6 41:24,25	7:15 10:8 22:24	arguments (2)
25:14	adjustors (1)	42:6,13 45:17	anytime (1)	17:22,23
absolutely (1)	40:14	46:5,9 47:17,18	41:18	arson (1)
17:3	adopt (3)	48:10,18 49:12,18	anyway (1)	59:9
accept (1)	31:2 42:8 56:6	50:7,21 51:11,13	23:6	art (1)
13:6	adopted (1)	51:15,20,21,23	anywise (1)	57:25
accepted (1)	51:22	53:1 55:3 63:9,12	69:15	article (1)
54:19	advance (1)	69:3	Apparently (1)	52:19
accorded (1)	41:20	alert (1)	57:6	articulated (2)
47:15	advised (1)	41:20	appeared (2)	30:19 43:10
account (3)	9:4	Ali (2)	18:3 42:8	aside (3)
48:13,19 59:15	advisory (2)	58:22,23	appears (3)	8:13 39:17 66:17
ACCR (1)	22:7 23:18	alleged (1)	41:6,8,9	asked (15)
69:20	Aetna (5)	61:16	applicable (1)	8:11 12:19 13:7
Ace (1)	10:4,11,12,13,16	Allstate (1)	14:7	22:11,20 33:6,10
64:7	age (1)	59:4	applies (1)	44:13 48:7 52:24
act (2)	53:10	ambiguities (3)	63:14	57:2,9 58:10,25
22:15 41:1	agency (1)	26:8,10,15	appointed (4)	60:20
acting (2)	46:24	ambiguity (9)	13:18,21 14:4	asking (4)
5:3 39:17	aggregate (1)	25:24 26:22 27:16	23:21	12:22 40:21 42:17
action (1)	66:11	27:16 34:4,6,9,12	appointment (1)	43:18
69:15	ago (4)	49:7	24:2	asks (1)
active (2)	9:12 20:22 52:9	ambiguous (3)	approach (6)	19:13
10:7 23:11	57:5	34:1 49:2,3	31:1 32:10 42:2,10	aspect (1)
actively (2)	agree (3)	American (6)	56:15 62:9	45:25
20:16 22:2	20:11 35:16 39:19	24:19 25:1 57:21	approached (2)	asserting (1)
activities (2)	AGREED (1)	58:17 60:21 64:7	31:6 55:13	63:19
24:15,17	2:2	ample (1)	appropriate (3)	assertion (1)
additional (2)	agreement (2)	59:22	6:11 21:23 58:11	59:21
64:23 65:15	29:10 62:12	analyses (1)	approximate (1)	assets (2)
additions (1)	ahead (4)	31:1	13:10	59:14,23
35:2	19:20 23:17 29:12	analysis (3)	approximately (2)	assign (2)
address (1)	35:7	34:14 43:22 49:21	11:7 13:14	2:18 43:3
41:13	al (1)	answer (7)	approximation (1)	assigned (1)
addressed (4)	1:10	6:22 8:12 9:9 22:21	12:1	40:6
		23:17 32:7 51:5	April (4)	assignment (1)

21:23 associate (4) 16:9 18:7,8,9 Association (2) 24:20 53:2 assume (3) 6:22 37:16,20 assuming (1) 34:8 Assurance (1) 10:17 Atlanta (1) 3:9 attended (1) 40:13 attendees (1) 52:16 attention (1) 28:10 attorney (6) 3:5,15 8:4 11:15 13:11 20:1 attorneys (7) 45:7,11 58:8,11 59:1 62:10 67:10 authored (1) 33:14 authority (1) 54:14 Autobahn (2) 33:18,20 ave (1) 11:1 Avenue (1) 3:17 award (1) 52:9 aware (7) 20:24 21:9 23:7 36:24 37:4 42:24 51:20 A-L-I (1) 58:23 a.m (4)	5:9 67:20,20 68:12 <hr/> B back (14) 9:25 10:14 14:10 19:23 20:13 21:17 26:25 27:2 44:25 52:24 53:21 56:20 61:4 67:10 background (1) 25:9 bad (59) 8:11 11:8,14 12:2 12:15,19,21 13:10 14:18 15:6,13 16:3,5 17:1,8,14 18:23 19:6,9,17 21:14,18 35:14,18 35:19,20 36:8 39:2,7 41:2 49:9 52:22 53:3,19 54:3 55:5,16,17 56:3 57:9 59:2 60:1,2,3 61:16,23 61:25 62:17,23 63:1,10,12,13,15 63:16,21 65:25 66:3 67:11 bar (8) 22:7 23:11 24:17 24:20 25:1,5,6 52:9 bar-related (1) 24:15 based (3) 36:3 39:2 59:15 basically (3) 14:14 27:22 39:24 basis (4) 42:12 48:13,13 59:8 becoming (1) 67:14 began (2)	12:18 39:7 beginning (2) 15:6 39:6 behalf (4) 11:17,19 64:22 65:20 believe (11) 27:10 30:18 33:18 33:21 38:24 42:16 43:9 46:22,22 48:1 54:4 bench (4) 13:2,19 54:1 55:11 benefit (2) 20:10 63:11 benefits (1) 65:12 Bernard (6) 1:17 2:5 5:10,14,21 6:10 best (6) 28:8 36:7 41:22 54:10 57:12 61:15 better (10) 16:4 17:4 26:14 33:16 36:2 38:1 38:11 42:2,23 55:25 better-reasoned (1) 42:10 beyond (2) 14:25 28:7 big (4) 10:4,10,15 58:2 bind (1) 59:23 Birmingham (2) 5:8 40:13 body (1) 33:3 boiler (1) 47:5 bond (2) 17:24 61:21	book (1) 7:8 booklet (1) 52:15 books (2) 52:5 53:9 borrow (1) 48:6 Bowen (2) 12:6 13:4 breach (3) 11:8 20:7 35:14 breached (1) 63:5 break (3) 32:5 67:17,19 bride (1) 10:22 bridesmaid (1) 10:21 bridge (1) 53:15 brief (1) 67:5 broad (1) 37:13 broader (1) 25:19 Brown (1) 17:10 build (1) 12:18 bullet (1) 43:21 burned (1) 59:7 business (1) 64:13 <hr/> C C (3) 3:1 69:1,1 California (5) 30:18 31:17 32:11	32:17,21 call (5) 6:2 14:15 39:25 63:12,20 called (10) 7:11 12:6 18:4 19:22 20:13 22:6 22:18 28:20 35:18 47:22 calling (2) 26:5 61:8 Calls (1) 14:1 cancel (1) 54:14 cancellation (1) 55:5 cancelled (1) 54:17 Canons (1) 22:12 capital (1) 10:14 car (1) 64:17 care (1) 65:24 career (2) 6:16 39:25 carried (1) 57:6 carrier (1) 54:17 case (78) 1:5 5:24 7:8,13 9:1 9:14 11:22 12:5,9 12:12 13:1,4 16:13,20 17:1 19:9 20:2,8 21:13 21:25 22:8 23:5 30:19,20,20 31:4 32:13,24 33:8,21 34:25 36:22 37:6 37:17 39:2 41:2
---	--	--	--	---

43:23 45:8,11 46:1,9,11,15,23 49:3 50:24 51:2,4 51:6,19 54:8,9,25 55:8,8,9,18,23 56:23 57:21 58:15 58:19,24,25 59:3 60:5,9,13 61:1,6 63:24 64:4,19 65:3 66:18,23 67:2 68:1 cases (35) 7:9,15,18 9:14 12:22 14:19 16:3 16:5,17 17:1,9,14 19:6,18 21:1,14 21:15,18 24:4 28:25 30:3 31:9 31:14 33:3 50:1,2 51:11,15,15 54:6 54:7 55:4,17 56:5 66:19 casualty (4) 1:10 51:9 59:6 64:6 category (3) 16:17 64:2 67:2 cause (2) 5:11 69:16 Center (1) 3:7 century (1) 50:2 certain (6) 11:2,3,5 47:7,8 59:16 certainly (4) 7:7 14:25 21:24 58:20 Certified (3) 1:21 2:6 5:1 certify (3) 5:4 69:6,13 CGL (2) 46:21 47:1	chair (1) 23:18 champion (1) 43:5 chance (1) 34:22 changes (2) 24:1 35:2 Chaviers (1) 12:5 check (1) 20:5 checklist (1) 31:11 chief (3) 16:10 20:1,20 child (1) 64:18 child's (1) 65:3 Circuit (2) 16:8 53:1 circumstances (6) 27:23 28:15 38:23 59:11 63:18 66:2 cite (2) 45:7 50:6 cited (3) 30:20 33:3 51:9 Civil (2) 5:5 24:4 claim (6) 36:9 41:9,16 49:5 61:18,19 claiming (1) 12:15 claims (9) 11:15 12:2 13:10 40:7,10,10,12,17 61:19 clarification (2) 46:14 57:19 clarify (2) 51:7 68:5	CLE (3) 52:10,15 53:9 cleanup (3) 46:22 47:2 65:6 clear (9) 13:8 25:16,25 28:11 32:7 39:14 47:25 48:4 50:4 cleavage (1) 40:8 clerk (1) 19:24 client (1) 8:7 clients (2) 9:22,23 coal (2) 57:24 58:1 cocaine (1) 64:16 collecting (1) 57:25 college (1) 6:23 collusion (1) 26:6 come (10) 10:18 14:5 18:19 19:2 21:9 22:1,9 23:4 28:9 55:10 comes (1) 51:25 coming (2) 11:4 12:16 commencing (1) 5:9 Commissioner (2) 2:6 5:3 COMMISSION... 69:20 commissioning (1) 19:22 committee (7) 14:6,7 23:19,21	24:3,6 40:17 committees (1) 24:5 common (2) 29:24 30:2 companies (18) 8:2,5 9:4,19 10:19 11:2,3,3,5 28:24 39:18,25 64:21 65:4,5,8,9 66:13 company (49) 1:10 7:25 8:9,10,14 8:25 9:23,25 10:7 11:24 28:10 29:4 29:20 30:6,10 33:19 35:23 36:9 40:18 45:14 48:21 48:22 51:9 54:19 54:20,22 55:25 56:1,10 57:25 59:3,4 61:5,17,20 62:1,3,11,11 63:24 64:6,7,10 64:11,12,23 65:14 65:17 66:15 comparing (1) 23:23 comparison (2) 31:11,15 compendium (2) 53:8,23 competitive (1) 48:17 complaint (5) 27:24 28:7,12,14 28:16 compliance (1) 2:11 complicated-sou... 41:21 composition (1) 18:20 compound (3) 26:5 32:1,6	concluded (1) 68:12 conduct (2) 22:14 63:19 confidence (1) 23:25 confidential (3) 62:14 68:1,7 conflict (6) 10:2,4 11:21 20:5 20:11 60:8 Connecticut (1) 3:17 connection (1) 45:13 consider (8) 28:12 34:3 37:25 43:15 49:2 50:5 56:16 57:14 consideration (2) 26:13 43:15 considered (2) 14:10 36:16 consisted (1) 61:24 Consistently (1) 41:17 consists (1) 63:17 constellation (1) 65:7 constitutes (1) 51:24 constraints (1) 23:8 construction (3) 7:11,19 26:12 construe (1) 27:16 construed (3) 26:9,11,15 contacts (1) 19:25 contention (1)
---	---	---	---	--

65:22 context (1) 63:14 continuation (1) 22:10 Continuing (1) 30:16 contour (1) 12:12 contours (1) 39:8 contract (3) 11:9 20:7 35:14 contracts (1) 7:17 contrary (1) 25:15 contrast (1) 49:5 convoluted (1) 61:14 corners (5) 28:1,4,21 34:5 49:6 Corporation (2) 1:7 5:23 correct (32) 6:25 7:16 8:17,23 9:6 13:20 15:14 15:23,24 16:1 25:6,7,12,17,18 25:22,23 26:2,7 26:17 28:5 29:1 30:11 35:11 42:11 42:14 45:17 49:10 49:15 52:4 66:16 69:11 correctly (5) 40:25 41:4,22 50:20 55:14 costs (2) 46:22 47:2 counsel (15) 2:4,15,17 5:6 9:16 9:17 22:6 29:15	55:25 58:14,16 63:23 66:8,14 69:14 count (3) 34:15 47:21 48:3 counterpart (1) 30:22 countersued (1) 62:6 counting (1) 42:6 country (3) 50:9,23 51:24 County (2) 14:6 69:4 course (4) 7:2,11 32:23 34:4 courses (3) 7:3,7,18 court (50) 1:1,21 2:6,12 5:1 15:17 16:3,6,16 16:18 17:7,20 18:1,14,23 19:12 19:17,25 20:25 22:1,9,15,17 23:5 23:19,21,25 24:2 27:2 30:4,4 36:19 39:11 41:24,25,25 42:7 46:5,6,13 47:18 48:19 49:13 49:23 50:16 51:12 51:21 53:2 54:1 55:11 courtesy (2) 6:6,13 courts (5) 31:2 33:22 34:10 47:7,7 cover (1) 47:1 coverage (17) 9:2,14,17,20 26:9 26:13 28:11 35:13	35:23 36:15 38:4 59:5,7,20 64:9 65:13 66:6 credit (1) 52:15 critical (2) 32:25 33:8 cumulative (1) 43:12 cured (1) 54:18 current (2) 24:15,17 currently (1) 20:25 <hr/> D <hr/> damages (2) 46:20,25 date (2) 5:4 11:7 dated (1) 53:12 day (1) 57:7 days (1) 10:14 DC (1) 3:18 deal (5) 16:7 58:5,6,9 68:2 dealing (2) 15:13 24:9 dealt (2) 7:9 22:23 debatable (10) 35:12,24 36:17 38:3 42:13 48:11 48:21,25 49:8,22 debate (1) 37:24 debt (1) 59:17 decide (6)	21:22 34:5 38:20 46:5 49:2,5 decided (4) 34:8 36:2 46:6 59:18 decides (1) 29:6 deciding (3) 16:5 36:16 48:24 decision (9) 18:1,2 29:6 33:1,14 36:5,13 47:18 51:22 decisions (7) 12:21 13:16 15:11 16:23 32:25 42:4 49:20 declaratory (2) 29:22 30:8 default (1) 54:18 defend (7) 26:19 27:8,21,22 29:5 37:15 65:14 defendant (2) 3:13 58:15 DEFENDANTS (...) 1:11 defendant's (1) 37:15 defending (2) 28:24,24 defense (12) 8:4,22 9:8,16 25:18 29:8,13,17,18,20 30:6 65:21 defined (2) 26:8 63:10 definition (1) 37:14 degree (3) 15:9 31:5,16 denial (1) 42:13	denied (6) 36:15,18 59:4,7,20 65:21 denies (1) 36:9 deny (1) 38:3 denying (1) 35:23 department (1) 40:10 depended (1) 27:10 depends (1) 52:7 DEPONENT (1) 68:14 deposition (15) 1:15 2:4,9,10,19 45:2 57:3,18 60:13,16 62:23 66:20 68:12 69:7 69:11 depositions (1) 2:13 describe (1) 61:6 described (7) 8:20,21 27:23 28:3 28:15 52:21 55:16 describing (1) 47:24 descriptions (1) 65:16 designate (1) 67:25 despite (2) 28:11 51:16 detailed (1) 43:22 details (1) 20:6 determine (1) 38:2
--	--	---	--	--

developed (2) 36:15 60:8	68:7	48:7 51:1	8:15 61:20 62:5	21:21 23:3
Dewayne (3) 54:8 56:23 61:1	doing (4) 19:19 29:13 42:6	early (2) 55:12 57:13	64:10	EUO (1) 59:11
different (8) 9:19 24:8 34:2,11 49:25 50:3 61:19 65:8	62:7	easier (1) 55:21	employee's (1) 62:19	evaluate (4) 31:4 32:8,15,19
differing (1) 33:23	domain (1) 63:21	education (3) 6:20 7:2,21	employer (1) 11:20	evaluation (1) 32:11
difficulty (1) 17:12	doubt (2) 27:19 53:11	effect (2) 2:10 54:21	Employers (1) 51:8	everybody (3) 6:4 12:13 40:13
diligence (2) 58:7,12	doubts (4) 26:19,21,23 27:7	eight (1) 28:21	enforcement (1) 24:10	evidence (8) 2:20 23:20,23 33:25 34:7,12 38:14 59:8
disappearing (1) 11:5	drafted (1) 47:11	either (7) 18:21 20:3 21:12 25:24 29:8 41:18 57:2	engaged (1) 8:1	evolution (1) 39:8
discuss (1) 16:15	drawing (2) 28:19 38:15	elaborate (2) 44:15 52:13	enlighten (1) 17:19	evolved (1) 8:3
discussion (4) 24:13 34:18 47:6 47:16	drinking (1) 64:15	elaborations (1) 45:3	enter (3) 29:9,12,20	exact (2) 37:9 59:18
disqualification (1) 19:14	drive (1) 40:15	elected (2) 15:16 23:5	entered (3) 30:6 46:7 62:12	exaggerating (1) 15:1
dissent (1) 16:14	driven (1) 59:9	element (4) 35:17,19,20 58:18	entering (1) 29:17	examination (6) 4:1,5 5:11,18 59:12 59:13
dissenting (1) 19:6	driver (1) 64:18	elements (1) 35:13	entertain (1) 34:3	examined (1) 5:15
distinct (2) 9:7 40:8	driver's (1) 64:15	eligibility (1) 20:13	entire (2) 16:16,18	example (2) 9:10 16:8
distinction (5) 8:6 28:19 41:15,19 66:13	driving (1) 64:11	else's (1) 38:21	entree (1) 14:14	examples (2) 7:14 50:21
District (3) 1:1,2 53:2	drops (1) 19:15	embezzlement (1) 61:18	EPA (2) 37:13 46:23	excellent (1) 8:12
divided (1) 16:9	due (3) 58:7,12 66:6	embrace (1) 46:21	equal (1) 11:20	exception (1) 24:20
division (14) 1:3 16:12,20,21,21 18:2,5,6,8,13,19 18:21,21 65:12	duly (1) 5:15	emerge (1) 39:7	equally (1) 32:16	excess (2) 64:8 66:12
divisions (3) 16:9 17:21,22	duties (1) 9:5	emerged (1) 11:2	Eslami (2) 58:22 59:1	exciting (1) 24:11
document (4) 42:22 43:12 44:14	duty (9) 26:19,20 27:8,21 27:22 29:5 37:15 63:5 65:14	emergence (1) 11:7	essentially (4) 29:11 30:21 63:8 63:18	exclude (2) 42:18 44:10
	E	emergent (1) 12:8	established (1) 14:16	exclusive (1) 10:20
	E (4) 3:1,1 69:1,1	employed (4) 7:9 8:9 34:17 40:18	et (1) 1:10	exclusively (1) 8:4
	earlier (5) 38:25 39:25 40:17	employee (4)	ethical (1) 23:8	
			ethics (2)	

**Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood**

October 26, 2011

Page 75

excuse (1) 27:11	33:8	59:3 60:1,2,3	finally (1) 42:11	5:16
exhausted (3) 65:13,22,23	extent (6) 14:4 16:19 31:20 36:3 41:10 52:17	61:16,23 62:1,18 62:23 63:1,10,12 63:13,15,16,21 65:25 66:3 67:12	finance (3) 54:12,14,18	force (1) 2:10
exhaustion (2) 65:12 66:6	extrinsic (1) 34:7	fall (2) 63:8,20	financed (1) 54:12	foregoing (3) 5:6 69:7,10
exhibit (6) 4:11 34:20,24 35:9 40:20 54:5	e-mail (3) 3:11,20 67:5	falls (1) 37:13	financial (2) 59:10,19	foreign (1) 24:10
EXHIBITS (1) 4:8	E-S-L-A-M-I (1) 58:23	familiar (6) 5:25 17:16 19:9 27:25 28:20,23	find (4) 37:12 50:13 57:10 65:4	foreshadowed (2) 44:19,20
exist (2) 9:12 25:24	F	familiarity (1) 51:19	finder (1) 38:17	forget (1) 59:17
existed (2) 9:25 66:2	F (1) 69:1	far (6) 12:25 32:14 49:11 51:5 60:23 66:25	finding (3) 26:9,12 27:21	form (3) 2:16 31:18,25
existence (1) 27:8	fact (13) 28:11,13 30:5 36:7 38:16,17 40:9 47:6 51:14,16 52:8 55:3 59:16	fashion (3) 16:14 18:11 43:25	fine (3) 6:7 10:22 64:14	formal (1) 7:2
existing (2) 50:7 51:11	facts (6) 20:4 27:12 28:9,15 45:10 51:5	favor (6) 26:9,11,15,20 27:9 27:20	Fire (2) 61:5,9	formally (1) 55:22
expected (1) 48:22	factual (4) 26:24 27:19 36:4,6	favorably (1) 27:17	fired (1) 62:5	former (5) 20:20,21,24 21:22 23:9
expenses (1) 58:7	failed (1) 66:22	federal (3) 23:24 37:19 38:14	firm (2) 20:6,9	formerly (2) 22:1 40:16
experience (3) 39:16,20 56:24	failure (3) 60:1 63:10,11	fee (1) 58:11	first (15) 5:15 8:2 25:9,12 49:1 50:15 51:23 52:25 56:24 57:11 62:18 66:4 67:10 67:13,15	forms (1) 52:16
expert (22) 21:1,10,12,19,20 21:23 22:11,21,24 22:25 23:4,9 34:24 38:19,21 43:20 56:24 61:22 61:22 62:22 67:8 67:9	fair (6) 17:18 42:19 43:7 43:17 45:4 56:4	feel (3) 15:1 39:11 40:24	first-most (1) 18:7	formulating (1) 31:3
expertise (1) 39:3	fairly (3) 6:15 48:10 67:5	fees (2) 58:8 67:10	five (2) 19:16 54:6	forward (4) 23:6 29:7 49:8 60:11
explain (2) 29:2 31:24	faith (56) 11:8,14 12:2,15,21 13:10 14:19 15:6 15:13 16:3,5 17:1 17:9,14 18:23 19:6,9,18 21:14 21:18 35:14,18,20 35:21 36:8 39:2,7 41:2 49:9 52:22 53:3,19 54:3 55:6 55:16,17 56:3	fell (1) 58:5	five-member (1) 16:12	Foster (4) 30:19,20 32:25 33:9
explanation (1) 44:5		felt (1) 59:16	focusing (1) 63:1	found (2) 59:10,25
explicit (1) 63:2		fidelity (1) 61:21	follow (1) 43:22	four (9) 16:9 19:16 28:1,4 34:5 49:6 52:3,6 56:5
expressed (2) 37:11 43:4		fiduciary (1) 63:5	followed (2) 37:11 39:7	fourth (2) 61:5,8
expressly (1)		fifth (1) 16:10	following (1) 5:12	Frank (1) 3:14
		filed (1) 55:9	follows (1)	frankly (1) 53:10

free (1) 40:24	59:1 68:8	2:18 26:5	14:18 16:3 17:22	13:22,24 14:9
freewheeling (1) 62:9	given (19) 10:18 14:11 21:10	group (3) 54:12,14 64:2	hearing (1) 69:12	hurricane (1) 65:6
friends (1) 14:13	21:12 25:16 35:22	gubernatorial (1) 14:12	held (2) 44:25 53:13	<hr/> I <hr/>
full (2) 2:11 5:20	42:4 48:8 52:8,10	guess (5) 19:16 36:7 38:13	help (2) 38:1,11	idea (4) 14:22 34:3 46:21
function (2) 19:8 27:23	52:11 53:10 54:14	39:9 52:7	helpful (3) 29:7 38:16,22	46:25
further (3) 34:16 68:14 69:13	57:4,11 59:21	guesstimate (1) 13:13	helps (3) 37:7 40:24 42:15	identification (1) 35:10
fwinston@stepto... 3:20	66:2,20 69:12	guidance (1) 33:16	hierarchy (1) 43:6	identified (1) 11:6
<hr/> G <hr/>	gives (1) 39:11	guilty (1) 49:9	hinted (1) 44:24	Illinois (1) 31:5
gain (1) 34:16	giving (8) 7:14 12:25 20:6,25	Guy (2) 13:22,24	hire (2) 11:23 56:19	implicit (1) 63:22
gained (2) 32:12 62:21	44:6 52:11 63:3,4	<hr/> H <hr/>	hired (1) 66:14	important (1) 43:9
garnered (1) 48:15	gloss (1) 47:13	Hand (1) 5:7	hiring (1) 40:2	impression (2) 32:12 51:23
Gary (3) 54:7 56:23 61:1	go (14) 15:3 16:18 21:17	handle (1) 11:14	hit (1) 64:17	improper (1) 55:4
Gas (2) 1:7 5:23	23:5,16 27:2 29:7	handled (3) 12:2,23 13:11	home (1) 59:7	INA (1) 10:3
gears (1) 45:4	29:12 35:7 40:1,3	handouts (1) 52:14	homeowners (1) 59:5	incidental (1) 22:8
GEIGER (1) 3:6	49:8,11 50:10	happened (4) 19:10,11 60:5 61:3	Hon (4) 1:17 2:4 5:10,14	incite (1) 34:16
general (2) 25:10 30:17	55:20 56:4 58:1	happens (1) 30:2	honor (2) 54:23 66:3	included (1) 7:9
generally (6) 5:25 10:15 21:18	60:9 61:24 63:15	hard (3) 11:1 12:17 17:14	Honorable (1) 6:10	including (1) 7:5
25:19 39:19 46:17	64:13	Hardwood (1) 34:19	honored (2) 41:19 66:7	indemnifying (1) 29:17
geographical (1) 9:11	good (6) 5:19 14:18 17:4	Hartford (8) 8:25 61:4,8,18 62:2	honorific (1) 6:13	indemnity (1) 25:20
Georgia (1) 3:9	19:19 33:6 39:12	Harwood (10) 1:17 2:5 5:10,14,19	horizon (1) 12:14	INDEX (2) 4:1,8
give (16) 9:9,13 12:1,16 13:9	gotten (1) 67:5	5:21 6:3,11,15	Horris (1) 10:16	indicated (2) 11:4 47:13
14:22 22:25 26:3	govern (1) 25:11	34:20	Houston (4) 18:6,21 20:19 21:5	industry (2) 39:17,21
33:16 43:20 52:24	Governor (2) 13:22 14:9	heads (2) 18:8,9	Hunt (3)	inform (1) 21:22
54:25 56:2,19	graduated (1) 6:23	hear (3)		
	grounded (1) 39:15			
	grounds (2)			

information (7) 36:14 62:4,13,16 62:21,25 63:6	66:13,15 insured (13) 11:25 26:11,16,20 27:9,17 29:9,10 54:18 64:22,24 65:15,20	54:13 55:7,15 57:8,23 58:19 64:11 65:6,8 involvement (2) 58:21 65:5 involving (1) 50:24	37:19,21,23 38:1 38:7,19 39:10 56:12 60:7 67:14 judges (6) 6:18 20:15 21:22 23:9 53:2,11 judgment (6) 15:4 29:22 30:8 37:7 57:7 67:6 judgments (1) 24:10 judicial (2) 14:6 47:13 juris (1) 41:24 jurisdiction (2) 32:16 45:23 jurisdictions (9) 31:13 32:9,20 33:23 34:11 46:13 47:22 48:8 50:8 jurisprudence (2) 50:8,22 jury (6) 24:3 35:24 37:21 38:2,11,22 justice (19) 12:10 16:10 18:8 18:11,15,24 20:1 20:3,19,19,20,21 20:23 21:5,5,5,7 39:11 54:1 justices (6) 15:22 16:10 18:2,7 20:18,25	69:14 knew (2) 12:13 62:7 know (30) 6:21 8:5 10:21 11:2 12:17 15:3 18:12 18:25 21:4,16 25:3 30:1 34:22 46:4,24 47:21 53:7,9,20,21 56:21 57:4 60:11 60:14,23 61:2 65:3,10,18 67:1 knowledge (3) 38:15 39:3 53:6 known (2) 47:12 57:23
informed (1) 25:10 informing (1) 30:25 inherent (1) 38:24 inherited (1) 10:8 initially (5) 12:16 15:17 16:13 16:19 18:5 inner-workings (1) 17:19 inquired (1) 59:13 insight (1) 40:15 Institute (1) 24:6 Instruction (1) 24:4 insurance (75) 7:3,10,11,19,19,22 7:25 8:2,5,9,10,14 8:21 9:4,8,19,22 9:25 10:7,19 11:8 11:24 24:18,20 25:12,13,15 28:10 28:24 29:4,19 30:10 31:6 32:10 33:19 35:14,23 36:9,12 39:16,18 39:21,25 40:18 45:8,11,14 48:21 48:22 50:7,23,25 51:20,22 54:11,20 54:22 55:24 56:1 56:10 58:18,21 59:3,4 61:5,17 62:1 63:14,23 64:21 65:9,11,17	insureds (2) 65:24 66:4 insurer (3) 35:12 47:11 53:18 insurers (3) 11:17,19 29:2 intend (1) 44:21 intentional (1) 31:11 interested (1) 69:15 interfered (1) 58:4 interjecting (1) 44:18 interpretation (5) 27:12 30:22 33:24 47:10,14 interpreted (2) 47:7,8 interviewed (1) 62:2 interviews (1) 62:22 intimately (3) 17:15 19:9 39:10 introduce (2) 6:14,14 investigate (1) 60:2 investigated (1) 59:24 involve (2) 7:19 57:16 involved (18) 9:15 13:3 21:13,19 29:7 30:3,5,5 36:6	issue (10) 38:8,18 39:2 42:4 44:17 45:22 46:4 48:9 50:25 51:13 issued (3) 47:11 60:12,14 issues (6) 7:4 30:4 46:18 47:3 50:23 55:7 issuing (2) 37:18,21 <hr/> J <hr/> Janie (1) 20:22 January (2) 15:21 55:11 JEFFERSON (1) 69:4 job (1) 19:19 Johnson (8) 3:16 36:24 37:4,17 37:21,23 38:1,7 Johnson's (2) 38:20 60:7 Jones (2) 12:10,10 Jr (2) 3:14 5:21 judge (25) 5:19 6:2,5 14:20,24 15:12 18:16,18 19:23 22:14 34:19 36:2,24 37:4,17	kin (1)	L <hr/> L (1) 2:1 laid (1) 43:4 language (1) 41:14 Large (1) 5:3 Laseter (17) 3:4,6 4:5 5:18,22 17:3 18:14 27:4 30:11 31:23 32:4 44:3 56:11 61:10 67:21 68:2,4 lastly (1) 64:1 late (1) 45:13 law (30) 3:5,15 6:23 7:5,15 8:18,18 24:6,21 25:12,13,14 27:11 30:18,23 32:10,21 32:21 36:7 37:6 42:13 48:10 49:18

50:7,25 51:13,20 52:18,25 55:6 laws (1) 2:11 lawsuit (1) 5:25 lawyer (18) 6:24 8:1,13 10:3,7 10:20 12:3 22:15 39:10,17 40:3,9 60:7 62:4,19 64:24 65:1,17 lawyers (3) 6:16 57:6 65:18 lawyer-like (1) 9:9 lead (1) 32:4 leadership (3) 24:22,25 25:4 leading (2) 2:16 32:2 leases (1) 58:1 Lee (1) 12:7 left (1) 44:11 legal (3) 22:6 26:6 39:3 legislation (1) 24:8 legitimate (1) 11:22 legitimately (1) 49:7 legs (1) 15:7 length (1) 45:1 lengthy (1) 57:5 letter (5) 29:9,12 36:25 37:2	37:5 letters (2) 37:12 49:14 Let's (1) 27:2 levels (1) 32:2 liability (3) 25:20 64:9,20 liberty (1) 62:15 license (2) 64:15 69:20 light (1) 64:16 likewise (3) 26:18 32:15,19 limitation (1) 53:25 limits (4) 64:25 65:22,23 66:5 line (6) 51:11,15,15 55:3 55:17 67:4 list (3) 10:24 42:25 64:1 listed (5) 52:4 54:6 60:15 61:5 66:19 listen (1) 27:3 listing (1) 52:2 litigation (2) 22:10 62:14 little (6) 10:4,10,16 14:24 17:12 33:16 lived (1) 39:10 LLC (1) 64:2 LLP (2)	3:6,16 local (1) 25:5 logic (1) 48:16 long (5) 6:4,15 9:12 20:21 57:5 longer (3) 6:5 9:12 57:8 look (13) 17:25 18:20 28:7 28:14 34:21 37:9 40:21 42:7,16 48:22 49:1,24 56:2 looked (2) 18:11 59:24 looking (9) 24:7 34:7,10 40:24 42:2 46:13 50:14 51:12 54:5 looks (1) 49:23 loosely (1) 58:3 lot (24) 6:21 7:7 9:18 10:1 10:8 15:3,4 17:11 17:14,16 30:24 39:20,24 40:6 44:15 49:25 50:2 53:13,14 56:19 57:25 61:19 62:7 65:7 It (1) 12:14 lurking (1) 44:24 Lyons (1) 20:19 <hr/> M <hr/> Maddox (1)	21:5 maintain (2) 8:6 20:13 major (5) 42:17,20,24 43:3 44:9 majority (10) 37:11 42:3 45:6 47:19,22,25,25 48:4,8,23 making (1) 53:25 Management (1) 64:2 Mann (1) 10:17 mark (2) 35:7 44:4 marked (2) 34:20 35:9 marks (1) 41:7 materials (4) 52:21 53:17 54:3 56:2 matter (4) 22:8,16 23:4 53:18 matters (4) 7:10,20 26:24 58:10 mean (16) 6:13 7:5 10:11 12:7 22:4 30:10,20 38:20 39:23 41:25 42:18 44:15,23 52:7 56:18 67:10 meandering (1) 60:24 meaning (5) 12:20 15:8 25:16 44:10 49:17 meanings (1) 26:1 means (1)	37:2 meant (2) 8:12 33:7 measured (1) 36:8 meeting (2) 40:12 52:9 meetings (1) 40:11 member (2) 16:11 24:19 mentioned (2) 9:21 34:5 method (2) 7:8,14 Midwest (1) 51:8 million (2) 64:9 66:12 mind (4) 6:2 19:3 21:17 51:25 mine (4) 14:13 38:21 57:24 58:1 minor (1) 43:4 minority (7) 42:3 45:7 50:8,22 51:2,17,24 mirrored (1) 31:6 mirrors (1) 30:21 misdoing (1) 61:20 misplaced (1) 51:5 Mitchell (2) 8:25 62:11 mix (2) 36:4 49:24 mixed (1) 36:7
---	--	---	--	---

moment (3) 34:21 35:7 42:15	64:6	number (7) 12:16 13:10 19:14 20:18 24:5 34:20 55:8	41:23 42:12 61:25 65:10	9:2,14,18 18:23 21:10 23:8 25:11 31:4 34:11,14 39:1 43:4,21,25 45:7 48:14 49:11 57:4,15
money (2) 14:11 62:7	9:15 17:13		offered (1) 2:20	
monthly (1) 40:11	NE (1) 3:8	numerical (3) 34:15 48:13,19	offers (1) 65:19	
months (1) 14:4	necessary (1) 2:14	NW (1) 3:17	office (1) 15:20	opponent (1) 14:11
morning (1) 5:19	need (4) 20:2 51:3 56:21 59:19	N-A-B-E-R-S (1) 21:6	offices (1) 5:7	opportunity (2) 11:20 58:4
mortgage (1) 59:17	needs (1) 66:4	<hr/> O <hr/>	Off-the-record (3) 24:13 34:18 47:16	opposing (1) 21:20
mother (1) 64:17	negligent (1) 55:4	O (1) 2:1	Oh (3) 11:13 13:5 23:12	oral (4) 5:11 17:22,23 53:4
motive (1) 59:20	negotiations (1) 66:3	oath (1) 59:12	okay (4) 18:20 31:21 35:8 61:12	order (3) 37:8 68:1,8
Moving (1) 61:4	neither (1) 69:13	object (5) 26:4,4 31:18 44:12 61:7	omitted (1) 42:25	ordered (1) 46:22
multiple (1) 32:2	never (8) 6:13 10:22 40:16 40:18 59:13 65:23 66:12 67:11	objection (18) 13:6 14:1 16:25 17:4 23:15 27:14 30:9 31:8,25 33:10 38:5 42:21 43:2,11 44:2 45:18,24 46:15	Once (1) 65:12	outcome (1) 48:10
multi-judge (1) 22:15	nonwaiver (1) 29:10	objectionable (1) 55:21	ones (6) 17:15,16 31:1 33:4 57:14 63:3	outline (2) 19:20 25:11
mumbling (1) 31:24	normal (3) 35:18,19 55:17	objections (2) 2:15,18	one-sided (1) 48:9	overflow (1) 10:23
Mutual (2) 10:3,17	normally (1) 55:16	objective (1) 23:1	open (2) 14:5 49:19	overwhelming (1) 48:23
<hr/> N <hr/>	NORTHERN (1) 1:2	obligation (3) 25:19,20 28:7	opened (1) 61:23	owed (1) 62:6
N (2) 2:1 3:1	noses (1) 42:6	observed (1) 33:21	opinion (40) 9:20 22:7 23:1 31:20 32:24 37:18 37:22 38:15,19,20 38:21 39:15 40:23 41:1,5,14,23 42:12,25 43:16 44:16 45:19 49:16 54:25 56:2,19,22 57:5,11 58:10 59:2,21 61:25 62:25 63:2,3,4,8 63:18 66:1	<hr/> P <hr/>
Nabers (2) 20:21 21:6	Notary (3) 1:22 2:7 5:2	obviously (2) 48:14 60:15		P (3) 2:1 3:1,1
name (11) 5:20,22 13:1,1 16:23 17:8 18:10 20:22 28:22 30:14 33:15	note (2) 33:5 67:25	occurrence (1) 12:11		page (6) 4:3,9 50:14,16 52:1 54:5
named (2) 18:6 64:22	noted (2) 31:10,19	October (2) 1:18 5:9		paid (4) 54:15,16 56:15 59:15
names (2) 14:8 17:7	notice (3) 45:14 54:16,20	offer (9) 39:1,15 41:1,5,13	opinions (19)	pains (1) 49:4
narrow (3) 24:14 47:19,22	noticed (1) 6:8			panel (1) 16:4
National (1)	November (1) 52:12			panels (1) 16:7

paper (2) 53:3,5	59:5 61:21	46:9 47:18	11:11,15 52:25	principles (2) 25:10 62:2
papers (2) 52:5,20	payments (1) 59:17	pleadings (1) 36:22	pragmatic (1) 29:6	prior (4) 2:20 6:9 12:9 43:20
paperwork (1) 54:13	peculiar (1) 45:16	please (1) 40:24	preceding (1) 27:6	private (1) 21:1
paragraph (1) 50:15	people (5) 6:6 11:23 12:15 56:19 63:6	plus (1) 48:23	precluded (1) 23:2	probably (10) 10:6,18 11:18 15:7 15:9 19:16 31:10 36:5 41:7 55:12
parameters (1) 63:9	percent (1) 11:18	point (11) 14:17 15:5 36:11 49:17 54:19 55:2 57:1 60:6 62:19 65:1,16	predict (1) 49:12	problems (1) 31:6
paraphrase (1) 28:9	period (2) 13:12 16:5	points (8) 30:17 42:17,20,24 43:9 44:9 45:5 46:12	prejudice (3) 29:14 45:13 51:3	Procedure (1) 5:5
Park (1) 5:8	permissible (1) 38:18	policies (4) 9:5 25:21 47:5 65:11	premature (1) 65:2	proceedings (1) 5:12
part (7) 40:16,21 43:15 54:12 57:6 58:11 62:8	person (1) 63:7	policy (24) 25:15 27:12 30:22 32:10 41:8,9,14 41:18 45:16 46:21 47:1,11 49:4 54:11,15,17,21 55:5 59:5,6 64:25 66:5,5,9	premiums (2) 54:15,16	process (2) 19:22 31:3
participate (1) 21:25	personal (1) 64:12	polices (4) 9:5 25:21 47:5 65:11	preparation (1) 51:19	professional (2) 22:13 23:3
participated (3) 17:17 22:2,18	persuade (1) 48:18	policy (24) 25:15 27:12 30:22 32:10 41:8,9,14 41:18 45:16 46:21 47:1,11 49:4 54:11,15,17,21 55:5 59:5,6 64:25 66:5,5,9	prepared (1) 68:6	proffered (1) 65:20
participating (1) 18:12	phone (1) 22:22	policyholder (1) 56:9	preparing (1) 32:23	project (1) 58:2
participation (2) 20:10 40:16	phrase (2) 47:8 48:1	Porterfield (2) 33:13,18	present (1) 39:5	projected (1) 12:12
particular (4) 32:14 35:5 40:21 42:19	pick (1) 31:5	posed (1) 52:2	presentation (2) 53:4 54:2	proposed (1) 24:7
particularly (2) 45:15 50:1	picture (1) 59:18	position (5) 22:23 23:2 51:2,8 54:22	presentations (2) 52:10 53:16	prospective (1) 39:12
parties (6) 2:3,17 20:5 21:1 58:3 69:14	Piedmont (1) 3:8	policyholder (1) 56:9	preserved (2) 53:5,22	protective (2) 68:1,8
party (1) 22:20	Place (1) 5:8	Porterfield (2) 33:13,18	pressed (1) 12:17	provide (1) 63:11
pattern (2) 24:3 30:5	plain (1) 25:16	posed (1) 52:2	presumably (1) 47:12	providing (1) 29:16
Paul (1) 10:3	plaintiff (7) 1:8 3:3 5:23 37:13 58:15,17 62:5	position (5) 22:23 23:2 51:2,8 54:22	pretty (6) 8:4 24:11 33:2 39:12 48:17 63:13	provision (1) 66:6
pay (4) 61:18 63:10 64:14 66:5	plaintiffs (3) 59:22 61:22 62:17	possible (3) 26:1 29:19 48:8	previously (1) 22:16	PRP (5) 36:25 37:1,5,12 49:14
payment (2)	plaintiff's (4) 62:4 64:24 65:1,17	potentially (2) 59:2 60:1	principally (1) 59:9	prudence (1) 41:24
	plan (2) 37:16,20	practice (8) 6:20 8:3,18,20,22 9:8 28:23 53:1	principle (1) 25:13	Public (4)
	Plating (2)	practicing (3)		

**Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood**

October 26, 2011

Page 81

1:22 2:7 5:2 69:20 publications (1) 52:3 published (5) 23:7 52:5,8,15,18 purposes (1) 37:6 pursuant (1) 5:4 put (5) 41:24 42:1 44:3 58:1 66:11 putting (1) 58:9	41:7 quote (1) 39:20 <hr/> R <hr/> R (2) 3:1 69:1 race (1) 14:12 ran (1) 64:16 rate (1) 64:8 rationale (2) 48:17,24 rationales (2) 34:17 42:8 reach (1) 20:17 reached (5) 33:23 34:11 38:8 57:1 64:24 reaching (1) 36:12 read (15) 6:9 17:13,16 19:11 26:25 31:9,19 33:2 34:14 36:21 43:8 46:8 57:20 67:24 68:9 reading (3) 2:8 33:8 48:14 ready (2) 65:18,19 reaffirmed (1) 51:16 reality (1) 56:14 really (8) 8:11 15:6 43:3,5 46:24 59:13 61:24 67:11 reason (12) 17:12 18:17 35:12	35:22 36:17 38:3 43:17 44:7 48:21 48:25 49:8,22 reasonable (1) 44:9 reasoned (1) 42:2 reasoning (1) 34:15 reasons (3) 29:16 37:10 42:7 recall (42) 7:10 9:22 13:1,17 15:10 16:23 17:7 17:11 18:22 19:5 19:17 21:6,7,16 21:20 30:12,14 33:4,7,13 45:8,10 45:25 46:2,8,11 46:17,18 47:3,17 47:23,24 48:1,3,5 50:9 53:17 54:10 58:20 61:15 64:9 64:14 recalled (1) 51:2 recalls (1) 23:16 recite (1) 12:20 recognize (3) 6:5 56:14 63:15 recognized (1) 28:6 recommendation... 23:25 recommissioned ... 19:15 record (2) 5:20 68:5 recover (1) 58:7 recused (1) 18:17	red (2) 12:10 64:16 reduced (1) 69:9 refer (5) 10:5,15 40:24 50:12 60:9 reference (1) 49:21 referred (4) 6:10 16:13 18:10 30:25 referring (6) 17:1 37:7 48:4 51:1 51:4 67:14 refusal (1) 61:17 refusing (1) 35:12 regard (13) 23:8 26:18 27:7,18 27:19 32:10 33:24 33:25 39:1 48:20 49:14 51:8 52:20 regards (2) 26:23 66:22 regular (2) 10:2 16:21 reinstitute (1) 54:21 related (1) 45:12 relates (1) 38:17 relating (2) 2:12 47:5 relationship (6) 8:8 13:23 14:3,17 41:5 54:13 Relevance (1) 23:16 relevant (1) 7:3 relied (1)	55:3 reluctant (1) 50:16 remember (9) 11:1 17:10,15 33:15 47:6 52:24 55:9 57:12,14 render (1) 48:9 rendered (1) 64:19 repeat (1) 50:11 report (22) 8:24 11:6 21:12 30:17,21 34:24 40:25 41:11,13 42:16 43:8,14 44:17,19,21 45:3 50:6,14 51:10 52:1 60:12,14 reported (6) 1:20 12:21 13:15 15:10 17:25 18:2 reporter (5) 1:21 2:6 5:2 18:15 27:2 reports (2) 25:3 43:20 represent (5) 5:23 8:7,8 22:16,24 representatives (1) 40:12 represented (3) 9:19 51:17 56:9 representing (6) 8:5 11:24 22:20 39:18 56:16 59:1 represents (1) 69:10 request (1) 68:6 required (1) 16:17
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17:13 19:12 research (1) 51:18 reservation (5) 28:25 29:8,11,21 30:7 resolved (3) 26:20 27:9,20 Resources (3) 57:21 58:17 60:21 respect (2) 40:9 61:21 respective (1) 2:4 response (1) 68:8 result (3) 13:15 59:11 69:16 results (1) 26:12 retain (2) 31:20 32:14 retained (11) 9:16 21:11 53:11 55:24,25 56:7 58:14 60:7 61:22 63:23 66:8 retired (2) 6:18 20:18 review (2) 32:24 52:19 reviewed (2) 31:14 36:21 right (20) 7:17 9:3 11:9,10 13:19 27:13 28:2 34:23 35:6 38:9 39:4 40:5 41:17 49:18 50:18 51:13 51:14 60:4 63:25 67:15 rights (6) 28:25 29:9,11,14 29:21 30:7	riveting (1) 24:12 Road (1) 3:8 Robert (1) 5:21 role (2) 24:25 57:24 roles (3) 23:13 24:22 25:4 rotate (1) 16:22 roughly (1) 13:11 rubrics (1) 30:25 rule (8) 5:4 16:18 22:2,4,12 38:13 50:22 52:2 ruled (2) 36:25 37:5 rules (10) 2:12 5:5 21:21 22:13 23:3,20,23 23:24 24:3 38:14 run (1) 20:5 <hr/> S <hr/> S (2) 2:1 3:1 Safeco (1) 12:7 sag (1) 44:17 SAITH (1) 68:14 Sargent (4) 1:20 2:6 5:1 69:19 sat (5) 16:24 20:19,20,21 22:9 satisfy (1) 37:12	save (1) 27:4 savings (1) 59:15 saw (2) 8:24 18:11 saying (12) 8:6 27:10 28:18 34:17 39:9 40:5 43:14 61:13 62:6 63:13 65:22 67:5 says (6) 16:15 22:14,17 29:12 37:10 50:16 school (4) 6:23 7:5,16 8:18 Scott (2) 3:4 5:22 sea (1) 15:7 second (1) 26:12 secondarily (1) 8:8 secondary (1) 26:13 second-most (1) 18:9 Securities (1) 3:7 see (15) 18:5,12,12,15,21 21:7 31:15 32:5 34:14,16 50:13,17 52:4 54:6 61:12 seeing (1) 31:2 seek (1) 29:21 seeking (1) 58:6 seen (6) 20:18,22 21:4 39:8 43:19 49:25	selection (1) 14:6 send (1) 29:8 senior (2) 18:7,8 sense (1) 52:18 sent (3) 14:10 54:16,19 sentence (3) 42:19 50:15,17 separate (1) 55:6 separately (2) 17:22 68:3 separation (1) 39:22 serious (2) 64:19,20 serve (3) 15:22 22:11,21 served (2) 15:25 24:4 serving (1) 23:3 settle (2) 65:2,18 settled (2) 15:6 65:19 shape (1) 39:9 share (1) 62:12 shared (3) 62:3,21,24 sharing (1) 63:5 Shearin (4) 54:8 55:8 56:23 61:1 she'll (1) 38:20 shift (1)	45:4 Shores (1) 20:22 short (1) 67:17 shorthand (1) 56:7 should've (1) 60:20 show (4) 28:11 45:13 51:3 59:19 showing (1) 34:19 shows (2) 9:11 55:8 side (2) 55:23 56:6 sides (1) 11:21 sign (2) 67:24 68:10 signature (1) 2:8 significance (1) 50:19 similar (4) 31:16 32:9,17,21 simply (3) 39:13,21 44:4 sit (5) 16:20 17:22 18:17 19:13 20:3 sits (1) 16:10 sitting (7) 13:9 14:19 19:2,5 43:7 57:12 67:18 situation (10) 21:4 22:5,19 27:20 51:10,12 54:11 58:13 61:15 62:20 situations (3) 30:12 51:21 63:16
---	---	--	---	---

**Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood**

October 26, 2011

Page 83

six (2) 14:4 52:11	special (4) 12:11 20:3,12,23	step (1) 19:20	suing (2) 63:6,7	sworn (1) 5:15
six-year (3) 15:22,25 19:10	specialized (1) 38:15	STEPTOE (1) 3:16	suit (9) 37:5,14 41:6,7,8,15	system (1) 64:16
slang (2) 17:8 55:20	specially (1) 7:22	STIPULATED (1) 2:2	49:3,13,17	S-E-E (1) 18:15
slaseter@kglatto... 3:11	specific (2) 31:14 40:22	stipulation (1) 5:6	Suite (1) 3:8	S-H-E-A-R-I-N (1) 54:8
slightly (1) 45:5	specifically (2) 19:7 33:4	straight (1) 8:17	suits (1) 12:15	T
slow (1) 12:18	speculation (1) 14:2	street (1) 11:22	summarized (1) 42:17	T (4) 2:1,1 69:1,1
small (1) 10:13	spelled (2) 10:13,14	strict (1) 63:13	summary (8) 15:3 37:7 42:20	take (7) 34:21 36:11 40:1
snapshot (1) 36:11	split (1) 47:9	strike (1) 36:25	43:21,24 44:9	42:15 65:10,19
somebody (2) 16:15 56:15	St (2) 10:3 12:11	study (1) 23:22	57:7 67:6	67:16
somewhat (1) 53:12	staff (1) 20:1	studying (1) 7:16	superintendent (1) 40:7	taken (2) 2:5 69:7
son (1) 60:7	stage (1) 15:4	sub (2) 45:5 65:6	supervision (1) 69:10	takes (1) 37:23
sorry (1) 50:10	stand (1) 45:1	subcommittee (1) 24:18	support (2) 48:15,16	talk (1) 25:9
sort (19) 6:6,17 11:19 12:12	standards (2) 30:22 31:7	subcommittees (1) 24:7	supposed (1) 22:25	talking (3) 55:18 62:19,23
21:17 23:13 30:24	start (2) 28:13 34:6	subject (3) 38:19 53:18 54:24	supposedly (1) 64:12	tasks (1) 40:6
31:11 36:10 40:15	started (2) 12:17 52:17	submits (1) 14:8	Supreme (22) 15:16 16:2 17:6,20	Tel (2) 3:10,19
43:20,24 44:24	starting (1) 54:7	submitted (1) 14:9	18:1,23 20:25	tell (9) 18:1 19:21 37:17
47:1 53:23 57:24	state (10) 5:2,20 12:8 22:7	subsequent (1) 50:3	23:19,21 24:2	37:20 54:9 55:22
58:12 61:14 67:11	31:5,21,22 32:14	substantially (1) 22:18	30:4 36:19 39:11	58:23 61:15 64:4
sorts (1) 62:8	46:24 69:3	sub-group (1) 24:18	41:25 42:6 46:5	tend (1) 6:16
sought (1) 30:7	statements (1) 40:1	sued (3) 58:5 62:6,17	47:18 48:18 49:12	tender (1) 64:25
SOUTHERN (1) 1:3	states (2) 1:1 37:12	sufficient (1) 59:8	51:21 54:1 55:11	tenure (2) 17:6 19:10
space (1) 61:11	statute (2) 16:18 25:14	suggesting (1) 39:14	sure (12) 7:13 12:19 13:7	term (23) 6:17 15:22,25 16:2
speak (1) 11:20	stenotypy (1) 69:8		20:8 28:17,18	25:25 26:1 27:25
speaks (5) 42:22 43:12 44:14			38:25 39:13 43:24	28:20 33:24 34:1
45:19 46:16			53:24 55:1 60:6	37:1 41:6,15,15
			SURETY (1) 1:10	42:9 45:16 46:25
			surfaced (1) 65:14	
			surprised (1) 18:25	

47:12,19 49:3 55:20 57:24 58:3 terms (1) 41:18 test (4) 28:1,4,21 34:5 testified (4) 5:16 62:22 66:23 67:7 testify (4) 44:21 60:17,21,25 testifying (2) 56:24 66:18 testimony (6) 21:1 23:9 38:25 57:18 66:20 67:3 tests (1) 30:24 th (1) 6:21 thank (2) 19:21 57:20 thanks (1) 56:20 that'd (2) 6:7 22:2 theft (1) 61:18 theory (1) 62:18 thereto (2) 2:20 69:8 they'd (1) 20:4 thing (4) 19:8 31:12 34:2 59:11 things (7) 16:22 44:16 45:3 47:4 49:25 58:8 62:8 think (38) 6:17 9:8 10:10 12:4 12:6,10 14:16	19:8 20:20 21:17 22:17 24:9 25:10 28:19 32:4,7 36:10 37:23 38:7 38:10,13 40:8 42:5 45:12 46:7 48:18 49:1 52:12 53:13,20 55:19 56:12,25 63:22 64:6 65:15 66:11 67:17 thinking (1) 21:18 third (2) 65:14,21 thoroughly (1) 43:8 thought (3) 50:25 59:8,9 three (4) 14:8,8 21:7 52:9 time (32) 2:18,19 9:13,13,18 9:18 10:1,1,18 11:12 15:7 16:5 19:13,13 20:22 26:3 27:5 36:4,8 36:15,17 45:1 49:24,24 50:3 53:21,25 54:19 55:12 57:11 67:10 67:13 times (3) 19:16 22:23 43:18 title (2) 6:6,13 today (7) 5:24 13:9 19:2,5 43:8 57:12 66:18 told (2) 60:8 67:3 topic (2) 54:3,24 tort (6)	7:22 11:8 12:7 35:13 39:6 63:15 torts (1) 7:18 total (1) 64:8 touch (1) 58:21 Tower (1) 5:8 traditional (1) 6:18 transcript (4) 6:9 67:24 68:6 69:11 transcripts (1) 6:9 transition (1) 25:8 Travelers (5) 1:10 10:24 38:3 41:1 42:12 treated (1) 35:25 Treatise (1) 52:18 trend (3) 49:20 50:1,4 trial (18) 2:19 13:18 14:19 14:24 15:11 30:4 39:10 44:22 57:2 60:17,19,22,25 66:20,24,25 67:3 67:7 trier (1) 38:16 triggers (1) 37:14 tri-parte (1) 8:7 truck (1) 64:12 trucking (2)	64:10,11 true (3) 31:12 53:13 69:11 try (8) 8:6 17:4 24:14 42:18,23 51:7 52:13 58:1 trying (8) 24:16 31:21 43:23 44:7 57:10 62:20 65:9 67:4 turn (1) 50:2 turned (1) 56:18 Turning (2) 40:20 52:1 Tuscaloosa (3) 10:6 14:6 25:5 two (10) 15:2 16:9 17:21,21 18:6 25:25 46:12 65:20 66:4,13 two-year (1) 23:22 type (1) 60:2 types (1) 24:8 typewriting (1) 69:9 <hr/> U <hr/> U (1) 2:1 Uh-huh (2) 45:9 64:3 ultimate (1) 38:18 unanimous (1) 16:11 uncertain (1) 29:5 uncertainty (2)	27:19 29:22 unclear (1) 49:17 undecided (1) 51:13 underlying (3) 42:7 44:10 48:24 underpinnings (1) 48:16 understand (19) 7:13 12:23 17:20 24:16 28:17,18 30:17 37:1 38:2 40:25 41:4,12,22 43:24 49:10 53:24 57:17,19 68:5 understanding (3) 45:21 50:20 55:14 understands (1) 6:4 understood (2) 25:19,24 uniform (3) 24:9 47:10 48:15 uniformly (1) 47:8 United (4) 1:1 57:21 58:17 60:21 updates (1) 24:1 use (4) 6:7,17 58:3 62:16 USF&G (2) 9:11,21 usually (2) 18:10 19:24 Utica (1) 10:3 <hr/> V <hr/> V (1) 1:9 vacancy (3)
---	--	---	--	---

**Alabama Gas Corporation v. Travelers Casualty and Surety Company, et al. 2:10-CV-1840 IPJ
Hon. Bernard Harwood**

October 26, 2011

Page 85

14:5,9,13 vague (6) 14:2 29:25 30:9 31:8 32:3 45:20 various (1) 25:4 variously (1) 33:3 verbally (1) 22:22 versus (3) 12:7 42:3 45:6 view (5) 23:1 36:1 37:24 51:17,24 views (2) 33:23 42:1 Vincent's (1) 12:11 volunteer (1) 20:4 vote (1) 16:12	12:20 47:9 51:4 59:23 watched (1) 39:8 water (1) 53:14 way (11) 10:23 12:24 16:6 31:21,22 37:9 39:16 41:12 46:2 47:9 66:2 weight (3) 42:1,3 45:6 went (11) 6:22,23 7:15 8:17 13:2 14:14 18:5 40:10,11 53:3 66:3 weren't (2) 13:3 54:15 we'll (6) 29:12 56:20 58:3 62:12,13 64:25 we're (8) 5:24 23:22 24:8 29:13 55:18 62:15 63:1,14 we've (10) 20:2,17 22:22 40:1 55:3 65:11,12,22 67:5,17 winnows (1) 14:7 Winston (30) 3:14 14:1 16:25 23:15 26:3,25 27:14 29:25 30:9 31:8,18,23 32:1 33:10 38:5 42:21 43:2,11 44:1,12 45:18,24 46:15 48:7 56:8 61:7,12 67:16,23 68:9 withdrawal (1)	29:14 witness (5) 2:9 5:10 22:12 23:16 69:12 witnesses (2) 43:20 48:7 word (2) 14:10 41:8 words (4) 10:2 25:15 29:15 36:14 work (14) 8:13 9:10 10:1,2,16 10:17,23 11:21 15:5,11 39:24 58:11 65:7,10 worked (3) 7:24 8:14 16:7 working (2) 24:8 66:10 works (1) 19:22 worry (1) 11:23 worthy (1) 43:15 wouldn't (2) 15:1 18:25 would've (5) 12:2 31:19 32:12 47:13 59:25 wrapping (1) 23:22 wreck (2) 40:1 64:11 wrestling (1) 12:9 written (7) 8:25 12:11 22:4 52:21 54:3 57:5 57:15 wrong (2) 37:17,21 wrongful (2)	55:5 63:19 wrote (1) 18:22 <hr/> Y <hr/> yeah (18) 11:13 14:21 20:17 22:5 24:12 30:12 30:24 34:2 36:10 37:8 39:5 42:5 44:23 48:2 50:13 50:24 55:19 61:10 year (4) 14:25 15:2,9 52:11 years (9) 8:3 14:25 17:13 52:3,6,9,23 53:1 67:15 <hr/> 0 <hr/> 05 (1) 55:9 07 (1) 55:11 <hr/> 1 <hr/> 1 (5) 4:11 34:20,24 35:9 40:20 10 (2) 14:25 15:9 10-year (1) 13:12 10:21 (1) 67:20 10:31 (1) 67:20 10:33 (1) 68:12 11th (1) 16:8 1200 (1) 5:7 1330 (1) 3:17	1981 (2) 11:7 12:4 1982 (1) 12:5 1983 (1) 12:7 <hr/> 2 <hr/> 2nd (1) 52:12 2:10-CV-1840 (1) 1:5 20 (3) 10:19 13:14 52:25 200 (1) 52:10 2000 (1) 15:20 2001 (2) 15:19,21 20036-1795 (1) 3:18 2011 (2) 1:18 5:9 202 (1) 3:19 26 (3) 1:18 5:9 52:2 28 (2) 8:2 67:15 <hr/> 3 <hr/> 3-year-old (1) 64:18 30 (2) 5:4 10:19 30305 (1) 3:9 3490 (1) 3:8 35 (1) 4:11 350 (1) 3:8
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4				
4 (3) 50:14 64:9 66:11 404)812-0844 (1) 3:10 429-6482 (1) 3:19				
5				
5 (3) 4:5 64:2 67:2 579 (1) 69:20				
6				
6 (2) 52:1 54:5				
7				
702 (1) 38:14				
9				
9:01 (1) 5:9 90 (1) 11:18 91 (2) 13:2,19				